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Report of the International Law Commission

Fifty-seventh session
(2 May-3 June and 11 July-5 August 2005)

General Assembly
Official Records
Sixtieth session
Supplement No. 10 (A/60/10)

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The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook ... 1971*) indicates a reference to the *Yearbook of the International Law Commission.*

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 2005.*

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CHAPTER I

Introduction

1. The International Law Commission held the first part of its fifty-seventh session from 2 May to 3 June 2005 and the second part from 11 July to 5 August 2005[1] at its seat at the United Nations Office at Geneva. The session was opened by Ms. Hanqin Xue, First Vice-Chairperson of the Commission at its fifty-sixth session.

A. Membership

2. The Commission consists of the following members:

Mr. Emmanuel Akwei Addo (Ghana)
Mr. Husain M. Al-Baharna (Bahrain)
Mr. Ali Mohsen Fetais Al-Marri (Qatar)
Mr. Joao Clemente Baena Soares (Brazil)
Mr. Ian Brownlie (United Kingdom)
Mr. Enrique Candioti (Argentina)
Mr. Choung Il Chee (Republic of Korea)
Mr. Pedro Comissário Afonso (Mozambique)
Mr. Riad Daoudi (Syrian Arab Republic)
Mr. Christopher John Robert Dugard (South Africa)
Mr. Constantin P. Economides (Greece)
Ms. Paula Escarameia (Portugal)
Mr. Salifou Fomba (Mali)
Mr. Giorgio Gaja (Italy)
Mr. Zdzislaw Galicki (Poland)
Mr. Peter C.R. Kabatsi (Uganda)
Mr. Maurice Kamto (Cameroon)
Mr. James Lutabanzibwa Kateka (United Republic of Tanzania)
Mr. Fathi Kemicha (Tunisia)

[1] See Chap. XII, para. 497.

Mr. Roman Anatolyevitch Kolodkin (Russian Federation)

Mr. Martti Koskenniemi (Finland)

Mr. William R. Mansfield (New Zealand)

Mr. Michael J. Matheson (United States)

Mr. Theodor Viorel Melescanu (Romania)

Mr. Djamchid Momtaz (Islamic Republic of Iran)

Mr. Bernd H. Niehaus (Costa Rica)

Mr. Didier Opertti Badan (Uruguay)

Mr. Guillaume Pambou-Tchivounda (Gabon)

Mr. Alain Pellet (France)

Mr. Pemmaraju Sreenivasa Rao (India)

Mr. Victor Rodríguez Cedeño (Venezuela)

Mr. Bernardo Sepulveda (Mexico)

Ms. Hanqin Xue (China)

Mr. Chusei Yamada (Japan)

B. Officers and the Enlarged Bureau

3. At its 2831st meeting, on 2 May 2005, the Commission elected the following officers:

Chairman:	Mr. Djamchid Momtaz
First Vice-Chairman:	Mr. Guillaume Pambou-Tchivounda
Second Vice-Chairman:	Mr. Roman A. Kolodkin
Chairman of the Drafting Committee:	Mr. William Mansfield
Rapporteur:	Mr. Bernd Niehaus

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission[2] and the Special Rapporteurs.[3]

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[2] Mr. J.C. Baena Soares, Mr. E. Candioti, Mr. Z. Galicki, Mr. P.C.R. Kabatsi, Mr. T.V. Melescanu, Mr. A. Pellet, Mr. P.S. Rao and Mr. C. Yamada.

[3] Mr. I. Brownlie, Mr. C.J.R. Dugard, Mr. G. Gaja, Mr. M. Kamto, Mr. A. Pellet, Mr. P.S. Rao, Mr. V. Rodríguez Cedeño and Mr. C. Yamada.

5. On the recommendation of the Enlarged Bureau the Commission set up a Planning Group composed of the following members: Mr. G. Pambou-Tchivounda (Chairman), Mr. E.A. Addo, Mr. C.I. Chee, Mr. P. Comissário Afonso, Mr. R. Daoudi, Mr. C.P. Economides, Ms. P. Escarameia, Mr. S. Fomba, Mr. Z. Galicki, Mr. P.C.R. Kabatsi, Mr. J.L. Kateka, Mr. F. Kemicha, Mr. R.A. Kolodkin, Mr. M. Koskenniemi, Mr. M.J. Matheson, Mr. D. Opertti Badan, Mr. A. Pellet, Ms. H. Xue and Mr. B. Niehaus (ex officio).

C. Drafting Committee

6. At its 2834th and 2844th meetings, on 6 and 25 May 2005, respectively, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) Reservations to treaties: Mr. W. Mansfield (Chairman), Mr. A. Pellet (Special Rapporteur), Mr. P. Comissário Afonso, Mr. R. Daoudi, Ms. P. Escarameia, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. F. Kemicha, Mr. R.A. Kolodkin, Mr. M.J. Matheson, Ms. H. Xue and Mr. B. Niehaus (ex officio).

(b) Responsibility of international organizations: Mr. W. Mansfield (Chairman), Mr. G. Gaja (Special Rapporteur), Mr. C.I. Chee, Mr. P. Comissário Afonso, Mr. C.P. Economides, Ms. P. Escarameia, Mr. R.A. Kolodkin, Mr. M.J. Matheson, Mr. P.S. Rao, Ms. H. Xue, Mr. C. Yamada and Mr. B. Niehaus (ex officio).

7. The Drafting Committee held a total of six meetings on the two topics indicated above.

D. Working Groups

8. At its 2832nd, 2836th, 2840th and 2843rd meetings, on 3, 11, 18 and 24 May 2005, respectively, the Commission also established the following Working Groups and Study Group:

(a) Study Group on Fragmentation of international law: difficulties arising from the diversification and expansion of international law

Chairman: Mr. M. Koskenniemi

(b) Working Group on Unilateral acts of States

Chairman: Mr. A. Pellet

(c) Working Group on Shared natural resources

Chairman: Mr. E. Candioti

(d) Working Group on Responsibility of international organizations

Chairman: Mr. G. Gaja

9. The Working Group on long-term programme of work reconvened and was composed of the following members: Mr. A. Pellet (Chairman), Mr. J.C. Baena Soares, Mr. Z. Galicki, Mr. M. Kamto, Mr. M. Koskenniemi, Ms. H. Xue and Mr. B. Niehaus (ex officio).

E. Secretariat

10. Mr. Nicolas Michel, Under-Secretary-General, the Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Ms. Mahnoush H. Arsanjani, Deputy Director of the Codification Division, acted as Deputy Secretary to the Commission. Mr. George Korontzis, Senior Legal Officer, served as Senior Assistant Secretary, Mr. Trevor Chimimba and Mr. Arnold Pronto, Legal Officers, served as Assistant Secretaries to the Commission.

F. Agenda

11. At its 2831st meeting, on 2 May 2005, the Commission adopted an agenda for its fifty-seventh session consisting of the following items:

1. Organization of work of the session.
2. Diplomatic protection.
3. Responsibility of international organizations.
4. Shared natural resources.
5. Unilateral acts of States.
6. Reservations to treaties.
7. Expulsion of aliens.

8. Effects of armed conflicts on treaties.

9. Fragmentation of international law: difficulties arising from the diversification and expansion of international law.

10. Programme, procedures and working methods of the Commission and its documentation.

11. Cooperation with other bodies.

12. Date and place of the fifty-eighth session.

13. Other business.

CHAPTER II

SUMMARY OF THE WORK OF THE COMMISSION AT ITS FIFTY-SEVENTH SESSION

12. As regards the topic "Shared Natural Resources", the Commission considered the third report of the Special Rapporteur (A/CN.4/551 and Corr.1 and Add.1), which contained a complete set of 25 draft articles on the law of transboundary aquifers. The Commission also established a Working Group on Transboundary Groundwaters chaired by Mr. Enrique Candioti to review the draft articles presented by the Special Rapporteur taking into account the debate in the Commission on the topic. The Working Group had the benefit of advice and briefings from experts on groundwaters from UNESCO and the International Association of Hydrogeologists (IAH). It also held an informal briefing by the Franco-Swiss Genevese Aquifer Authority. The Working Group reviewed and revised eight draft articles and recommended that it be reconvened in 2006 to complete its work (Chap. IV).

13. Concerning the topic "Effects of armed conflicts on treaties", the Commission considered the first report of the Special Rapporteur on the topic (A/CN.4/552), presenting an overview of the issues involved in the topic together with a set of 14 draft articles in order to assist the Commission and Governments with commenting, including providing State practice. The Commission endorsed the Special Rapporteur's suggestion that a written request for information be circulated to member Governments (Chap. V).

14. As regards the topic "Responsibility of international organizations", the Commission considered the Special Rapporteur's third report (A/CN.4/553), proposing nine draft articles dealing with the existence of a breach of an international obligation by an international organization and the responsibility of an international organization in connection with the act of a State or another international organization. The Commission considered the third report and adopted nine draft articles together with commentaries (Chap. VI).

15. As regards the topic "Diplomatic protection", the Commission considered the Special Rapporteur's sixth report (A/CN.4/547) dealing with clean hand doctrine (Chap. VII).

16. As regards the topic "Expulsion of aliens", the Commission considered the Special Rapporteur's preliminary report on the topic (A/CN.4/554), presenting an overview of some of the issues involved and a possible outline for further consideration of the topic (Chap. VIII).

17. With regard to the topic "Unilateral acts of States" the Commission considered the eighth report of the Special Rapporteur (A/CN.4/557) which contained the analysis of 11 cases of State practice and the conclusions thereof. A Working Group on Unilateral Acts was reconstituted and its work focused on the study of State practice and on the elaboration of preliminary conclusions on the topic which the Commission should consider at its next session (Chap. IX).

18. Concerning the topic "Reservations to Treaties", the Commission considered part of the Special Rapporteur's tenth report (A/CN.4/558 and Add.1) and referred seven draft guidelines dealing with validity of reservations and the definition of object and purpose of the treaty to the Drafting Committee. The Commission also adopted two draft guidelines dealing with the definition of objections to reservations and the definition of objection to the late formulation or widening of the scope of a reservation together with commentaries (Chap. X).

19. In relation to the topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", the Commission held an exchange of views on the topic on the basis of a briefing by the Chairman of the Study Group on the status of work of the Study Group. The Study Group considered the memorandum on regionalism in the context of the Study on the "Function and Scope of the *lex specialis* rule and the question of 'self-contained regimes'"; the Study on the Interpretation of Treaties in the light of "any relevant rules of international law applicable in relations between parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties); as well as the final report on the Study on Hierarchy in International Law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules. The Study Group also received the final report on the Study concerning the modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties) (Chap. XI). The Study Group envisaged that it would be in a position to submit a consolidated study, as well as a set of conclusions, guidelines or principles to the fifty-eighth session of the Commission (2006).

20. The Commission set up a Planning Group to consider its programme, procedures and working methods (Chap. XII, sect. A). The Commission decided to include in its current programme of work one new topic, namely "The obligation to extradite or prosecute (*aut dedere aut judicare*)". In this regard, the Commission decided to appoint Mr. Zdzislaw Galicki, Special Rapporteur for the topic.

21. The Commission continued traditional exchanges of information with the International Court of Justice, the Inter-American Juridical Committee, the Asian-African Legal Consultative Organization and the European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law of the Council of Europe. Members of the Commission also held informal meetings with other bodies and associations on matters of mutual interest (Chap. XII, sect. C).

22. A training seminar was held with 24 participants of different nationalities (Chap. XII, sect. E).

23. The Commission decided that its next session be held at the United Nations Office in Geneva in two parts, from 1 May to 9 June and 3 July to 11 August 2006 (Chap. XII, sect. B).

CHAPTER III

SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

A. Shared natural resources

24. Under this topic, the Commission is now focusing for the time being on codification of the law on transboundary groundwaters (aquifers and aquifer systems). The work is progressing in the form of elaboration of draft articles on the basis of the proposals by the Special Rapporteur contained in his third report.[4] In its 2004 report, the Commission requested States and relevant intergovernmental organizations to provide information in reply to the questionnaire prepared by the Special Rapporteur.[5] The responses received from 23 States and 3 intergovernmental organizations[6] were very useful for the Commission in its current work. Accordingly, the Commission requests those States and intergovernmental organizations that have not yet responded to submit detailed and precise information on the basis of the questionnaire prepared by the Special Rapporteur.

B. Effects of armed conflicts on treaties

25. The Commission would welcome any information Governments may wish to provide concerning their practice with regard to this topic, particularly more contemporary practice. Any further information that Governments consider relevant to the topic is also welcome.

C. Responsibility of international organizations

26. The next report of the Special Rapporteur will address questions relating to (1) circumstances precluding wrongfulness, and (2) responsibility of States for the internationally wrongful acts of international organizations. The Commission would welcome comments and observations relating to these questions, especially on the following points:

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[4] A/CN.4/551 and A/CN.4/551/Corr.1.

[5] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 81.

[6] A/CN.4/555 and A/CN.4/555/Add.1.

(a) Article 16 of the articles on Responsibility of States for Internationally Wrongful Acts only considers the case that a State aids or assists another State in the commission of an internationally wrongful act.[7] Should the Commission include in the draft articles on responsibility of international organizations also a provision concerning aid or assistance given by a State to an international organization in the commission of an internally wrongful act? Should the answer given to the question above also apply to the case of direction and control[8] or coercion[9] exercised by a State over the commission of an act of an international organization that would be wrongful but for the coercion?

---

[7] Article 16 reads as follows:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (*b*) The act would be internationally wrongful if committed by that State.

Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), p. 47.

[8] See article 17 of the articles on Responsibility for Internationally Wrongful Acts which reads as follows:

> A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:
>
> (*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (*b*) The act wou'd be internationally wrongful if committed by that State.

Ibid.

[9] See article 18 of the articles on Responsibility for Internationally Wrongful Acts which reads as follows:

> A State which coerces another State to commit an act is internationally responsible for that act if:
>
> (*a*) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(b) Apart from the cases considered under (a), are there cases in which a State could be held responsible for the internationally wrongful act of an international organization of which it is a member?

D. Expulsion of aliens

27. The Commission would appreciate receiving any information concerning the practice of States on the subject, including national legislation.

E. Unilateral acts of States

28. The Commission would welcome comments and observations from Governments on the revocability and modification of unilateral acts. In particular, it would be interested to hear about the practice relating to the revocation or modification of unilateral acts, any particular circumstances and conditions, the effects of a revocation or a modification of a unilateral act and the scope of possible third party reactions in that respect.

F. Reservations to treaties

29. States often object to a reservation that they consider incompatible with the object and purpose of the treaty, but without opposing the entry into force of the treaty between themselves and the author of the reservation. The Commission would be particularly interested in Governments' comments on this practice. It would like to know, in particular, what effects the authors expect such objections to have, and how, in Governments' view, this practice accords with article 19 (c) of the 1969 Vienna Convention on the Law of Treaties.

(*b*) The coercing State does so with knowledge of the circumstances of the act.

Ibid.

CHAPTER IV

SHARED NATURAL RESOURCES

A. Introduction

30. The Commission, at its fifty-fourth session (2002), decided to include the topic "Shared natural resources" in its programme of work[10] and, at its 2727th meeting, on 30 May 2002, appointed Mr. Chusei Yamada as Special Rapporteur.[11] The General Assembly, in paragraph 2 of resolution 57/21 of 19 November 2002, took note of the Commission's decision to include the topic "Shared natural resources" in its programme of work.

31. At its fifty-fifth (2003) and fifty-sixth (2004) sessions, the Commission, respectively, considered the first (A/CN.4/533 and Add.1) and second (A/CN.4/539 and Add.1) reports of the Special Rapporteur. The latter report contained a proposed general framework and a set of six draft articles. At the fifty-sixth session, the Commission also established a Working Group, chaired by the Special Rapporteur.

B. Consideration of the topic at the present session

32. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/551 and Corr.1 and Add.1). It considered the report at its 2831st to 2836th meetings, held on 2, 3, 4, 6, 10 and 11 May 2005. The Commission also had an informal technical presentation on the Guarani Aquifer System Project on 4 May 2005. At its 2836th meeting, the Commission established a Working Group, chaired by Mr. Enrique Candioti. The Working Group held 11 meetings.

33. At its 2863rd meeting, on 3 August 2005, the Commission took note of the report of the Working Group. It expressed its appreciation that the Working Group had made substantial progress in its work by reviewing and revising eight draft articles. The Commission took note of the proposal of the Working Group that the Commission consider reconvening it at the 2006 session in order that it may complete its work.

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[10] Ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), para. 518.

[11] Ibid., para. 519.

1. Introduction by the Special Rapporteur of his third report

34. In introducing the complete set of 25 draft articles contained in the third report (A/CN.4/551 and Corr.1 and Add.1), the Special Rapporteur recalled that in the 2004 report of the Commission he had already indicated his intention to submit such a complete set on the basis of the general outline. From the debates of the Sixth Committee during the fifty-ninth session of the General Assembly, there appeared to be general support for his basic approach and an endorsement of his proposal to submit such a set of draft articles. Commenting on the substance of the draft articles, the Special Rapporteur first observed that the need for an explicit reference to General Assembly resolution 1803 (XVII), on permanent sovereignty over natural resources, had been advocated by some delegations in the debate of the Sixth Committee. In his view such a reference could be in the preamble, the formulation of which would, however, have to be deferred until the completion of the consideration of the substantive provisions.

35. Secondly, the Special Rapporteur introduced the various draft articles. The substance of draft article 1,[12] remained the same as proposed in the second report (A/CN.4/539, para. 10). However, it was reformulated to clarify the three different categories of activities that are intended to fall within the scope of the draft articles.

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[12] Draft article 1 reads as follows:

Article 1 [Article 1]

Scope of the present Convention

The present Convention applies to:

(*a*) Utilization of transboundary aquifers and aquifer systems;

(*b*) Other activities that have or are likely to have an impact upon those aquifers and aquifer systems;

(*c*) Measures of protection, preservation and management of those aquifers and aquifer systems.

36. On draft article 2,[13] its subparagraph (a) had been recast to respond to concerns expressed on the terms "rock formation" and "exploitable quantities" of water. In clarifying the change, it was noted, first, that an aquifer consists of two elements: (a) an underground geological formation, which functions as a container; and (b) the extractable water stored in it. The term "rock" was a technical term used by hydrogeologists to include not only hard rock but also gravel and sand. Since in common usage, "rock" often means hard rock, the term "geological formation" seemed more appropriate than the term "rock formation". Secondly, to function as a container, the geological formation must be permeable, with at least a less permeable layer underlaying it and a similar layer often overlaying it. Extractable water exists in the saturated zone of the formation. The water above the saturated zone of the formation is in the form of vapour and is not extractable. Thus, to avoid confusion, the term "extractable" or "exploitable" is not used.

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[13] Draft article 2, incorporating A/CN.4/551/Corr.1, reads as follows:

Article 2 [Article 2]

Use of terms

For the purposes of the present Convention:

(*a*) "Aquifer" means a permeable [water-bearing] geological formation underlain by a less permeable layer and the water contained in the saturated zone of the formation;

(*b*) "Aquifer system" means a series of two or more aquifers [, each associated with specific geological formations,] that are hydraulically connected;

(*c*) "Transboundary aquifer" or "transboundary aquifer system" means, respectively, an aquifer or aquifer system, parts of which are situated in different States;

(*d*) "Aquifer State" means a State Party to the present Convention in whose territory any part of a transboundary aquifer or aquifer system is situated;

(*e*) "Recharging aquifer" means an aquifer that receives a non-negligible amount of contemporary water recharge;

(*f*) "Non-recharging aquifer" means an aquifer that receives a negligible amount of contemporary water recharge.

37. Subparagraph (b) defines an "aquifer system" as meaning a series of two or more aquifers and better clarifies the term "aquifer system" than previously. In the second report, a fiction that an aquifer system also includes a single aquifer was employed to achieve economy of words. The bracketed phrase "each associated with specific geological formations", which could alternatively be placed in the commentary, denoted the fact that an aquifer system may consist of a series of aquifers of different categories of geological formations.

38. Subparagraphs (c) and (d) remained the same as contained in the second report, while subparagraphs (e) and (f), defining "Recharging aquifer" and "Non-recharging aquifer" were new. Under draft article 5, it is contemplated that different rules would be applicable in respect of each category of aquifer. While water resources in a recharging aquifer, e.g. the Guarani aquifer (Argentina, Brazil, Paraguay and Uruguay), are renewable, such is not the case in a non-recharging aquifer in an arid zone, e.g. the Nubian Sandstone Aquifer (Chad, Egypt, Libya and Sudan).

39. Draft article 3,[14] is intended to emphasize the importance of bilateral and regional arrangements entered into by States concerned with respect to specific aquifers. If a binding

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[14] Draft article 3 reads as follows:

Article 3

Bilateral and regional arrangements

1. For the purpose of managing a particular transboundary aquifer or aquifer system, aquifer States in whose territories such an aquifer or aquifer system is located are encouraged to enter into a bilateral or regional arrangement among themselves. Such arrangement may be entered into with respect to an entire aquifer or aquifer system or any part thereof or a particular project, programme or use except insofar as the arrangement adversely affects, to a significant extent, the use by one or more other aquifer States of the water in that aquifer or aquifer system, without their express consent. Any State in whose territory such an aquifer or aquifer system is located is entitled to participate in the negotiation and to become a party to arrangements when such arrangements are likely to prejudice their positions vis-à-vis that aquifer or aquifer system.

2. Parties to an arrangement referred to in paragraph 1 shall consider harmonizing such arrangement with the basic principles of the present Convention. Where those parties consider that adjustment in application of the provisions of the present

instrument would be the preferred option, it would be cast as a framework convention. Thus, while the basic principles to be enunciated would have to be respected, the bilateral or regional arrangements would have priority.

40. Stressing that draft articles 5 and 7 were key provisions, it was observed that draft article 5[15] contains two basic principles found in almost all water-related treaties: the principle of equitable utilization which prescribes the right of a State to participate in an equitable manner with others in the utilization of the same activity, and the principle of reasonable utilization which prescribes the right as well as the obligation of a State in the

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Convention is required because of the characteristics and special uses of a particular aquifer or aquifer system, they shall consult with a view to negotiating in good faith for the purpose of concluding an arrangement beneficial to all the parties.

3. In the absence of an agreement to the contrary, the present Convention applies to the aquifer or aquifer system referred to in paragraph 1 only to the extent that its provisions are compatible with those of the arrangement referred to in the same paragraph.

[15] Draft article 5 reads as follows:

Article 5 [Article 3]

Equitable and reasonable utilization

1. Aquifer States shall, in their respective territories, utilize a transboundary aquifer or aquifer system in a manner such that the benefits to be derived from such utilization shall accrue equitably to the aquifer States concerned.

2. Aquifer States shall, in their respective territories, utilize a transboundary aquifer or aquifer system in a reasonable manner and, in particular:

(*a*) With respect to a recharging transboundary aquifer or aquifer system, shall take into account the sustainability of such aquifer or aquifer system and shall not impair the utilization and functions of such aquifer or aquifer system;

(*b*) With respect to a non-recharging transboundary aquifer or aquifer system, shall aim to maximize the long-term benefits derived from the use of the water contained therein. They are encouraged to establish a development plan for such aquifer or aquifer system, taking into account the agreed lifespan of such aquifer or aquifer system as well as future needs of and alternative water sources for the aquifer States.

3. In the application of paragraphs 1 and 2, aquifer States concerned shall, when the need arises, enter into consultation in a spirit of cooperation.

management of a particular activity in a reasonable manner. Although they were closely interrelated, taken for granted and often mixed up, the two principles were different and have thus been dealt with separately in paragraphs 1 and 2, respectively.

41. The Special Rapporteur viewed the principle of equitable utilization in paragraph 1 as viable only in the context of a shared resource. The acceptance of the principle in paragraph 1 thus implied a recognition of the shared character of the transboundary aquifer among the aquifer States. However, there was no intention to internationalize or universalize transboundary aquifers. Concerning the role of third States in the scheme, it was noted that the utilization and management of a specific transboundary aquifer was the business of the aquifer States in whose territory the aquifer is located and any third States were considered as having no role.

42. Paragraph 2, on reasonable utilization (i.e. sustainable utilization), was divided into subparagraphs (a) and (b) to reflect the practical application of this principle in different circumstances of a recharging and a non-recharging aquifer. Although many groundwater experts advocated sustainable utilization of groundwaters, the application of such a principle was viewed as only feasible for a resource which was truly renewable, such as surface water. Draft article 6[16] simply enumerated the relevant factors and circumstances that should be

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[16] Draft article 6 reads as follows:

Article 6

Factors relevant to equitable and reasonable utilization

1. Utilization of a transboundary aquifer or aquifer system in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

(*a*) The natural condition of the aquifer or aquifer system;

(*b*) The social and economic needs of the aquifer States concerned;

(*c*) The population dependent on the aquifer or aquifer system in each aquifer State;

(*d*) The effects of the utilization of the aquifer or aquifer system in one aquifer State on other aquifer States concerned;

(*e*) The existing and potential utilization of the aquifer or aquifer system;

taken into account in assessing what constitutes equitable or reasonable utilization in respect of a specific aquifer.

43. On the other key draft article 7,[17] there continued to be objection to the threshold of significant harm. Considering the particularities of aquifers, some delegations in the Sixth Committee preferred a lower threshold. However, the Special Rapporteur viewed the concept of significant harm to be relative and capable of taking into account the fragility of any resource. Moreover, the Commission's position was well established and there seemed to be no justification to depart from the threshold. Some delegations in the Sixth Committee were also

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(*f*) The development, protection and conservation of the aquifer or aquifer system and the costs of measures to be taken to that effect;

(*g*) The availability of alternatives, of comparable value, to a particular existing and planned utilization of the aquifer or aquifer system.

2. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is reasonable and equitable utilization, all relevant factors are to be considered together and conclusion reached on the basis of the whole.

[17] Draft article 7 reads as follows:

Article 7 [Article 4]

Obligation not to cause harm

1. Aquifer States shall, in utilizing a transboundary aquifer or aquifer system in their territories, take all appropriate measures to prevent the causing of significant harm to other aquifer States.

2. Aquifer States shall, in undertaking other activities in their territories that have or are likely to have an impact on a transboundary aquifer or aquifer system, take all appropriate measures to prevent the causing of significant harm through that aquifer or aquifer system to other aquifer States.

3. Where significant harm nevertheless is caused to another aquifer State, the aquifer States whose activities cause such harm shall, in the absence of agreement to such activities, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

opposed to a reference to "compensation" in subparagraph 3. However, the provision was similar to paragraph 2 of article 7 of the 1997 Convention on the Law of Non-Navigational Uses of International Watercourses (hereinafter referred to as the "1997 Convention") and had been proposed then by the Commission on the basis of State practice.

44. As regards the remaining draft articles, draft articles 8 to 10 deal with issues pertaining to cooperation among aquifer States, with draft article 8,[18] setting out the general obligation to cooperate and recommending implementation through the establishment of joint mechanisms or commissions at bilateral or regional levels. While draft article 9[19] deals with one aspect of

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[18] Draft article 8 reads as follows:

Article 8 [Article 5]

General obligation to cooperate

1. Aquifer States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain reasonable utilization and adequate protection of a transboundary aquifer or aquifer system.

2. In determining the manner of such cooperation, aquifer States are encouraged to establish joint mechanisms or commissions, as deemed necessary by them, to facilitate cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions.

[19] Draft article 9 reads as follows:

Article 9 [Article 6]

Regular exchange of data and information

1. Pursuant to article 8, aquifer States shall, on a regular basis, exchange readily available data and information on the condition of the transboundary aquifer or aquifer system, in particular that of a geological, hydrogeological, hydrological, meteorological and ecological nature and related to the hydrochemistry of the aquifer or aquifer system, as well as related forecasts.

2. In the light of uncertainty about the nature and extent of some transboundary aquifer or aquifer systems, aquifer States shall employ their best efforts to collect and generate, in accordance with currently available practice and standards, individually or jointly and, where appropriate, together with or through international organizations, new data and information to identify the aquifer or aquifer systems more completely.

cooperation, namely regular exchange of comparable data and information, the other aspect, monitoring, is addressed in a separate and independent draft article 10[20] to emphasize the importance of monitoring in managing transboundary aquifers.

45. Draft articles 16 and 17[21] set out procedural requirements for planned measures. Compared to the 1997 Convention, which contains elaborate procedures for planned activities, it

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3. If an aquifer State is requested by another aquifer State to provide data and information that is not readily available, it shall employ its best efforts to comply with the request, but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

4. Aquifer States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner that facilitates its utilization by the other aquifer States to which it is communicated.

[20] Draft article 10 reads as follows:

Article 10

Monitoring

For the purpose of being well acquainted with the conditions of a transboundary aquifer or aquifer system:

1. Aquifer States shall agree on harmonized standards and methodology for monitoring a transboundary aquifer or aquifer system. They shall identify key parameters that they will monitor based on an agreed conceptual model of the aquifer or aquifer system. These parameters shall include extent, geometry, flow path, hydrostatic pressure distribution, quantities of flow and hydrochemistry of the aquifer or aquifer system.

2. Aquifer States shall undertake to monitor such parameters referred to in paragraph 1 and shall, wherever possible, carry out these monitoring activities jointly among themselves and in collaboration with the competent international organizations. Where, however, monitoring activities are not carried out jointly, aquifer States shall exchange the monitored data.

[21] Draft articles 16 and 17 read as follows:

was noted that only two draft articles were presented. From the Sixth Committee debates, there seemed to be a general wish for simpler procedural arrangements, whole detailed elaboration could be left to the specific aquifer States concerned.

46. Draft articles 4 and 11 through 15,[22] as well as draft articles 18 to 25[23] were considered self-explanatory. However, attention was drawn to draft article 13 on protection of recharge and

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Article 16

Assessment of potential effects of activities

When an aquifer State has reasonable grounds for believing that a particular planned activity in its territory may cause adverse effects on a transboundary aquifer or aquifer system, it shall, as far as practicable, assess the potential effects of such activity.

Article 17

Planned activities

1. Before an aquifer State implements or permits the implementation of planned activities which may have a significant adverse effect upon other aquifer States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information, including any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned activities.

2. If the notifying State and the notified States disagree on the effect of the planned activities, they shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation. They may utilize an independent fact-finding body which may be able to make an impartial assessment of the effect of the planned activities.

[22] Draft articles 4, 11, 12, 13, 14 and 15 read as follows:

Article 4

Relation to other conventions and international agreements

1. When the States Parties to the present Convention are parties also to the Convention on the Law of the Non-navigational Uses of International Watercourses, the provisions of the latter concerning transboundary aquifers or aquifer systems apply only to the extent that they are compatible with those of the present Convention.

2. The present Convention shall not alter the rights and obligations of the States Parties which arise from other agreements compatible with the present Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under the present Convention.

...

Article 11 [Article 7]

Relationship between different kinds of utilization

1. In the absence of agreement or custom to the contrary, no utilization of a transboundary aquifer or aquifer system enjoys inherent priority over other utilization.

2. In the event of a conflict between utilization of a transboundary aquifer or aquifer system, it shall be resolved with special regard being given to the requirements of vital human needs.

Article 12

Protection and preservation of ecosystems

Aquifer States shall protect and preserve ecosystems within a transboundary aquifer or aquifer system. They shall also ensure adequate quality and sufficient quantity of discharge water to protect and preserve outside ecosystems dependent on the aquifer or aquifer system.

Article 13

Protection of recharge and discharge zones

1. Aquifer States shall identify recharge zones of a transboundary aquifer or aquifer system and, within these zones, shall take special measures to minimize detrimental impacts on the recharge process and also take all measures to prevent pollutants from entering the aquifer or aquifer system.

2. Aquifer States shall identify discharge zones of a transboundary aquifer or aquifer system and, within these zones, shall take special measures to minimize detrimental impacts on the discharge process.

3. When such recharge or discharge zones are located in the territories of States other than aquifer States, aquifer States should seek the cooperation of the former States to protect these zones.

Article 14

Prevention, reduction and control of pollution

Aquifer States shall, individually and, where appropriate, jointly, prevent, reduce and control the pollution of a transboundary aquifer or aquifer system that may cause significant harm to other aquifer States or to their environment. In the light of uncertainty about the nature and extent of some transboundary aquifers or aquifer systems, aquifer States are encouraged to take a precautionary approach.

Article 15

Management

Aquifer States shall undertake to establish plans and implement these plans for the proper management of a transboundary aquifer or aquifer system in accordance with the provisions of the present Convention. They shall, at the request by any of them, enter into consultations concerning the management of a transboundary aquifer or aquifer system, which may include the establishment of a joint management mechanism.

[23] Draft articles 18, 19, 20, 21, 22, 23, 24 and 25 read as follows:

Article 18

Scientific and technical assistance to developing States

States shall, directly or through competent international organizations, provide scientific, educational, technical and other assistance to developing States for the protection and management of a transboundary aquifer or aquifer system. Such assistance shall include, inter alia:

(*a*) Training of their scientific and technical personnel;

(*b*) Facilitating their participation in relevant international programmes;

(*c*) Supplying them with necessary equipment and facilities;

(*d*) Enhancing their capacity to manufacture such equipment;

(*e*) Providing advice on and developing facilities for research, monitoring, educational and other programmes;

(*f*) Minimizing the effects of major activities affecting transboundary aquifers or aquifer systems;

(*g*) Preparing environmental impact assessments.

discharge zones, which were located outside aquifers and were vital to their functioning. The regulation of activities in those zones would ensure that the functioning of the aquifers is not impaired. The draft article also addresses the situation in which such zones were located in third States, by making provision for cooperation, in principle non-obligatory. Attention was also drawn to draft article 18 on scientific and technical assistance to developing countries.

Article 19

Emergency situations

1. An aquifer State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency situation originating within its territory that causes, or poses an imminent threat of causing, serious harm to other States and that results suddenly from natural causes or from human conduct.

2. An aquifer State within whose territory an emergency situation originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency situation.

3. Where water is critical to alleviate an emergency situation, aquifer States may derogate from the provisions of the articles in parts II to IV of the present Convention to the extent necessary to alleviate the emergency situation.

Article 20

Protection in time of armed conflict

Transboundary aquifers or aquifer systems and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules.

Article 21

Data and information vital to national defence or security

Nothing in the present Convention obliges an aquifer State to provide data or information vital to its national defence or security. Nevertheless, that State shall cooperate in good faith with other aquifer States with a view to providing as much information as possible under the circumstances.

Since the science of hydrogeology was still in its infancy and relatively advanced only in the developed countries, such a provision was necessary to ensure assistance to developing countries, where most aquifers were located.

47. As to the form of final instrument, the Special Rapporteur, at the outset of his introduction, mentioned that the presentation of the draft articles should not be considered as in any way intended to prejudge the final outcome since he had not yet made a decision on the matter. While aware of views in the Sixth Committee in favour of non-binding guidelines, the Special Rapporteur urged that at this early stage, the focus be on the substance rather than the form.[24]

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[24] Draft articles 22 to 25 containing the final clauses read as follows:

Article 22

Signature

The present Convention shall be open for signature by all States from ... until ... at United Nations Headquarters in New York.

Article 23

Ratification, acceptance, approval or accession

The present Convention is subject to ratification, acceptance, approval or accession by States. The instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General of the United Nations.

Article 24

Entry into force

1. The present Convention shall enter into force on the ... day following the date of deposit of the ... instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State that ratifies, accepts or approves the Convention or accedes thereto after the deposit of the ... instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ... day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

2. Summary of the debate

(a) General comments

48. Members of the Commission commended the Special Rapporteur for his third report and his continuing efforts to elaborate the topic, taking into account the views of Governments, and to enrich its understanding by consulting and seeking the scientific advice of groundwater experts. Such an approach would assure an outcome that would be both generally acceptable and responsive to the concerns of the scientific community. The importance of the topic was stressed, and attention in this regard was drawn to the report of the High-level Panel on Threats, Challenges and Change,[25] which alluded to the topic.

49. Concerning general matters of structure, presentation, and how the consideration of the topic should be proceeded with, some members welcomed the overall structure and the draft articles presented by the Special Rapporteur, while some other members, depending on the importance that they attached to the substance of particular provisions, offered an indication that they preferred placement of certain draft articles at the beginning, at the end or their omission from the text. Some members also noted that the drafting of certain provisions needed to be reconsidered since the language used was merely hortatory and did not appear suitable for a legally binding instrument, which was their preferred option. Some other members, however,

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Article 25

Authentic texts

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto, have signed this Convention.

DONE at New York, this ____ day of _____ two thousand _____.

[25] Report of the High-level Panel on Threats, Challenges and Change, A more secure world: our shared responsibility, document A/59/565, para. 93.

felt that such language was entirely appropriate even in a framework instrument, which was aimed at providing States guidance in the further negotiation of specific instruments. Flexibility was considered to be an essential characteristic.

50. Some members also noted that some of the principles were couched with a high degree of generality and abstraction, thus giving rise to doubts as to whether, in practice, they would be helpful in providing sufficient guidance to States. On the other hand, it was pointed out that there was no other way to proceed since a more detailed and prescriptive text was likely to raise more questions than answers. Noting that the 1997 Convention was essentially used as the basis for formulating the draft articles, some members also commented that it would have helped to have a fuller appreciation of the draft articles if clarifications were offered in the report as to the reasoning behind any departure, even minor, from the language of the 1997 Convention, and if detailed commentaries were given on the proposed draft articles. While some members proposed the referral of the draft articles, except for a few, to the Drafting Committee, the preponderant view favoured their further consideration first within the context of a working group. As noted above, at its 2836th meeting, the Commission established such a Working Group.

51. Several members alluded to questions of paucity of State practice in the area and its impact on the work of the Commission. It was doubted whether there was sufficient State practice on which the Commission could proceed with a codification exercise. It was considered that the law in the area was still in its embryonic stages. Thus, the project would largely proceed as a matter of progressive development or analogously taking the 1997 Convention as a point of departure.

52. While reference to the 1997 Convention was generally perceived as inevitable, some members, bearing in mind the differences between surface and groundwaters, especially the vulnerability of aquifers, suggested the need to proceed with caution. It was noted that the topic was substantially different from that of watercourses, and, therefore, the 1997 Convention should be taken as a guide only. Groundwaters raised sensitive issues particularly from the perspective of environmental protection which needed to find proper reflection in the text, also taking into account developments since the adoption of the 1997 Convention, including within the Commission itself, such as the adoption of the draft articles on the prevention of transboundary

harm from hazardous activities. Given their physical characteristics, it was asserted that the protection and preservation of aquifers needed to be emphasized in policy considerations. Sustainability should not merely be regarded as related to utilization but also to the overall protection of the ecological conditions of the aquifers. Some members also recalled that the 1997 Convention had not yet entered into force and thus far lacked universal support.

53. Some members noted that, in the elaboration of the draft articles, the overriding consideration was the utilization and protection of aquifers, which could effectively be accomplished through bilateral and regional approaches. The Commission should therefore not aim at providing universal solutions but general principles that would guide and encourage bilateral or regional solutions. In this connection, some members also stressed the importance of taking into account developments at regional levels. In particular, work being carried out in respect of certain regional projects, including by the Common Market of the Southern Cone (Mercosur) in respect of the Guarani Aquifer, was highlighted. Mention was made of the project being carried out with the support of the World Bank and the Organization of American States to better understand the physical and technical characteristics of the Guarani aquifer as well as the work carried out by an ad hoc group of experts convened by the Council of Mercosur to establish principles and criteria for the use of the aquifer. Such work proceeded on the basis of the following considerations: (a) affirmation of territorial sovereignty; (b) the obligation not to cause significant harm; and (c) conservation through rational and sustainable utilization. Some members also stressed considerations concerning geographical proximity and efforts towards regional economic integration as relevant. At the same time, it was pointed out by some other members that bilateral and regional agreements did not always provide sufficient guidance since they often tended to favour the stronger parties.

54. Concerning the Special Rapporteur's suggestion to include an explicit reference to General Assembly resolution 1803 (XVII) in the preamble, some members supported such a reference once the preamble is elaborated. However, some other members felt that the principle of permanent sovereignty over natural resources was central to the topic and deserved full treatment in a separate draft article. Such a reference would dispel any criticism that groundwaters were a common heritage of humankind. Yet some other members doubted that there was any role for the principle in the draft articles: if the transboundary aquifer is

recognized as a shared natural resource it followed that no aquifer State could claim to have permanent sovereignty over it. It was also pointed out that there would not be any risk of undermining the principle even if such a reference were omitted.

55. Some members stressed the relative character of the concept of sovereignty and highlighted the importance of construing sovereignty for the purposes of the draft articles as not denoting absolute sovereignty. Water in a transboundary aquifer was not only subject to the sovereignty of a State in the territory in which it was located but also to the regulatory framework freely agreed upon by States that shared such an aquifer. Some other members sought to accentuate aspects of jurisdictional competence as well as the existence of an obligation to cooperate with each other rather than whether sovereign rights were absolute or limited. Since a transboundary aquifer or aquifer system would run under different national jurisdictions it was incumbent upon States concerned to mutually respect the sovereign rights of the other States in areas falling within their jurisdiction.

56. The relationship between the draft articles and general international law was also alluded to as a relevant consideration by some members and it was stressed that the operation of the draft articles should not be perceived in isolation but in the context of the continuing application of general international law. Such law continued to apply in respect of activities of States vis-à-vis their relations with other States. In particular, the underlying principles enunciated in the *Corfu Channel* case[26] were considered relevant in the case of transboundary aquifers.

57. The need to keep in view the relationship between the current sub-topic on groundwaters and the other related sub-topics in respect of oil and gas was highlighted by some members.

58. In relation to the overall substance of the draft articles, some members stressed that Part II containing general principles was fundamental to the overall structure of the draft articles. It would be helpful if such principles could provide useful guidance for States to negotiate and conclude agreements or arrangements that could be readily accepted by the parties concerned. It was also recalled by some members that in the elaboration of the draft articles on the law on the non-navigational uses of international watercourses, the Commission had held extensive debates

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[26] The *Corfu Channel* case (*United Kingdom v. Albania*), merits *I.C.J. Reports*, 1949, p. 4.

on questions concerning sovereignty, the principles of equitable and reasonable utilization, the obligation not to cause harm and the threshold of significant harm. Accordingly no useful purpose would be served in reopening these matters in the context of the present topic.

59. Some members expressed preference for a much more prominent and pronounced role for the precautionary principle while some other members considered the precautionary approach taken by the Special Rapporteur as adequate.

60. Some members, disagreeing with the Special Rapporteur, preferred elaborate provisions on the relationship with non-aquifer States, and to highlight their role. Such States particularly those in which recharge and discharge zones were located had an obligation to cooperate and exchange information with respect to the protection of aquifers. Furthermore, some other members stressed the importance of providing for an institutional framework both for the implementation of the provisions of the draft articles and for dispute settlement. In regard to the latter, the need for separate provisions on dispute settlement was highlighted.

(b) Comments on specific draft articles

61. Concerning draft article 1, on scope of the present Convention, some members supported the current reformulation. However, some other members pointed to the need to clearly delineate the scope of the topic either in the body of the article or the commentary, specifying those situations in which groundwaters would already be covered by the 1997 Convention, as well as the relationship between transboundary and national aquifers, by stating expressly that the draft articles do not apply to national aquifers. Moreover, there was need to include provisions concerning the regulation of obligations of non-aquifer States in the draft article.

62. While the draft articles as a whole contained specific provisions concerning the activities contemplated in subparagraphs (a) and (c), some members noted that there did not seem to be any elaborate draft articles that addressed activities covered by subparagraph (b). Some other members doubted the seemingly wide scope of subparagraph (b), as well as its placement. In regard to the former, some members sought its deletion while others suggested the need to clarify its scope, including the meaning of the term "impact". It was proposed that the term should be qualified by "significant" as a threshold so as to ensure consistency with the provisions of Part II of the draft articles. It would also help to avoid creating the impression that other uses

which may have negligible impact on aquifers are also covered by the regulatory framework of the draft articles. However, some other members endorsed the use of the term "impact", which as noted by the Special Rapporteur in his third report, had a wider scope than "harm". It was also noted that the phrase "other activities" was not sufficiently precise. Concerning the latter aspects of placement, some suggestions were made to place subparagraph (c) before subparagraph (b) in order to emphasize the prominent role that ought to be given to the protection, preservation and management of aquifers.

63. With regard to draft article 2, on use of terms, the new definition of "aquifer" in subparagraph (a), as well as the change from "rock formation" to "geological formation" and the deletion of "exploitable", was considered favourably by some members and there was also some support for the retention of the phrase "[water-bearing]" since it made the definition easier to be understood by a layperson. Furthermore, the definition of aquifer in the 1989 Bellagio Model Agreement concerning the use of Transboundary Groundwaters, which was considered more concise, made reference to "water-bearing". On the other hand, the deletion of "water-bearing" and the clarification of the term in the commentary, as proposed by the Special Rapporteur, also found support. Some members also pointed out that the concept of water "use" or "utilization" was essential to the definition. It should be reintroduced and should also include the element of exploitability. Some other members raised questions on the usefulness of retaining the reference to "underlain by less permeable layer" in the definition of aquifer. It was also wondered whether the definition would still apply even if the geological formation were not saturated with water.

64. Furthermore, some members saw the need to clarify certain changes in the definitions as compared to the ones proposed by the Special Rapporteur in the second report. In some instances different terms had been used, although the same meaning seemed to have been retained.

65. The notion of "aquifer system" in subparagraph (b) as consisting of a series of two or more aquifers as suggested in the corrigendum (A/CN.4/551/Corr.1) was considered an improvement over the earlier proposal contained in the Special Rapporteur's second report. It accentuated the transboundary nature of the aquifer as a source of obligations for States concerned rather than a universal source of obligations for all States. Some members considered

the phrase "[each associated with specific geological formations]", in the definition of "aquifer system" superfluous and supported its deletion and the clarification of its meaning in the commentary, as suggested by the Special Rapporteur.

66. With regard to the definition of transboundary aquifer in subparagraph (c), some members doubted whether the circular approach which was followed added any substance to the definition. Both "aquifer" and "aquifer system" were already adequately defined.

67. Some doubts were also expressed regarding the distinction between a "recharging aquifer" and a "non-recharging aquifer" in subparagraphs (e) and (f), respectively. The difference between negligible and non-negligible amount of contemporary water recharge seemed to be insignificant from a practical perspective. A recharge should not be given much weight in the consideration of the sustainability of the resources. Moreover, the diversity of aquifers would make it difficult to measure negligibility of the amount of recharge. In this regard, it was suggested that such definitional questions could best be addressed in the relevant substantive draft article 5, where a less rigid distinction could be made. It was also suggested that the matter should await the discussion on whether or not separate rules would be required under draft article 5. On the other hand, the distinction was welcomed by some other members. At the same time, it was pointed out that the definition of "contemporary" water recharge would be necessary in the commentary.

68. Comments were also made regarding the need to provide definitions or explanations for terms, such as "impact" in draft article 1, "significant harm" in draft article 7 et al., "recharge or discharge zones" in the territories of third States in draft article 13 (3), "adverse effects" in draft article 16, "significant adverse effect" in draft article 17 and "serious harm" in draft article 19, as well as of "uses" to distinguish the various uses of water.

69. As regards draft article 3, on bilateral and regional arrangements, some members expressed support for its general thrust since it highlighted the importance of bilateral and regional arrangements. It was asserted that in the case of groundwaters, more so than for surface water, it was pertinent to allow for more flexibility for such arrangements. Yet the wording seemed to be more strict than comparable provisions in the 1997 Convention.

Although it seemed cautiously worded, some other members noted that it would give rise to problems of interpretation and implementation. In particular, it was considered important that the provisions of the present draft articles should not affect the rights and obligations under existing agreements.

70. Doubt was also expressed regarding whether draft article 3 was an improvement over corresponding article 3 of the 1997 Convention. In this connection, some members would have preferred a text that followed closely the language of article 3 of the 1997 Convention. The use of the term "arrangement" which was considered too broad and uncertain than the more familiar precedent-based term "agreement" was questioned by some members. However, some other members accepted the proposed change for the reason given by the Special Rapporteur in his report that the cooperative framework for groundwaters remained to be properly developed and the term "arrangement" provided flexibility of participation.

71. Concerning paragraph 1, some members preferred stronger and more definitive language than a general encouragement to enter into bilateral or regional arrangements. Such obligation was critical, particularly in the context of a fragile resource such as an aquifer. It was also considered that the paragraph was overly detailed and it was suggested to simply recast the whole paragraph by recasting the first sentence in more obligatory language. Some other members, however, viewed the obligation to encourage as appropriate since it gave States the flexibility at bilateral and regional levels to decide on mutually acceptable arrangements, particularly considering that in some situations circumstances may be such that it may not be feasible to negotiate such arrangements for particular aquifers.

72. The principle of harmonization in paragraph 2 was considered important by some members who viewed it essential that a framework convention should contain principles that would assist States in the negotiation of bilateral and regional agreements. Some members, however, were of the view that the phrase "consider harmonizing" in the paragraph was too weak and needed to be replaced. With regard to paragraph 3, it was suggested that there should be an explicit reference to compliance with the general principles set out in the draft articles. Moreover, unlike the 1997 Convention, it was not clear whether the paragraph affected arrangements already concluded by States, thereby requiring their renegotiation. It was also pointed out that in the absence of agreement, States had a right to operate independently with

respect to the utilization of aquifers and were only limited by rights and obligations imposed by general international law. Some members suggested that any such utilization should nevertheless be consistent with the principles contained in Part II of the draft articles.

73. Concerning draft article 4, on relation to other conventions and international agreements, some members noted that it was a step in the right direction since, in the event of conflict, it automatically gave precedence to the draft articles over the 1997 Convention, as well as, in certain situations, over other international agreements. Some other members noted that there was potential for dual application of the present draft articles and the 1997 Convention. Accordingly, there was a need to strive for the creation of unified comprehensive legal regime governing both surface and groundwaters. However, some members expressed doubt on the suggested relationship between the draft articles and the 1997 Convention, noting that substantively the relationship was tenuous and different bodies of water were under consideration. Moreover, the whole question needed closer consideration, particularly in view of the fact that the 1997 Convention had not yet entered into force. The inclusion of an additional formulation on the relationship between the draft articles and general international law, which would be designed to assert the relevance of the latter was also suggested. Some other members suggested a preambular provision.

74. In relation to paragraph 1, it was noted that it would be inappropriate to suggest that the provisions of the 1997 Convention would only apply to the extent that they were compatible with those of the draft articles. Such a proposition would only be valid if all States which shared an aquifer were parties to the 1997 Convention. According to some members, it would be reasonable to contemplate the draft articles being framed in a form of a Protocol to the 1997 Convention. Such a possibility, however, did not find favour with some members who considered it important, legally and as a matter of policy, to delink the draft articles from the 1997 Convention.

75. Although some attention was drawn to article 311 (2) of the United Nations Convention on the Law of the Sea, some members doubted whether it could serve as a precedent for paragraph 2. Moreover, instead of a reference to conformity with the present convention, it was suggested that a reference to the general principles of the present convention would be more appropriate. It was also pointed out that it was difficult to envision how the present paragraph

related to draft article 3. It was thus suggested that the draft articles 3 and 4 should be replaced by article 3 of the 1997 Convention. Some members expressed preference for a provision that would specify that the future instrument would not affect the rights and obligations assumed under other agreements.

76. Concerning draft article 5, on equitable and reasonable utilization, several members expressed support for the principles therein, noting that they were important for aquifers in view of their fragile nature. However, some other members recalled that article 5 of the 1997 Convention which is similar to the present draft article was problematic during the negotiations of the 1997 Convention. The transposition of the two principles for application to groundwaters was therefore cautioned against. Indeed, some doubt was expressed regarding the application of these principles to groundwaters.

77. Some members recalled the necessary balance that must exist between sovereign rights of States over their natural resources and the need to safeguard the interests of other States as well as the rights of present and future generations. Accordingly, it was suggested that the principle of permanent sovereignty over natural resources rather than in the preamble or the principle of sovereign equality in draft article 8, could properly be dealt with in the context of draft article 5.

78. Concerning paragraph 2, some members welcomed the distinction drawn between rules applicable to recharging and non-recharging transboundary aquifers. It was noted that such a distinction would provide better protection for aquifers. On the other hand, some other members considered such a distinction as immaterial. Some questions were raised regarding how "sustainability" would be assessed in practice. It was not clear whether the requirement in subparagraph (a) that aquifer States should "not impair the utilization and functions of such aquifer or aquifer system" entailed zero risk or some form of graduated risk or risk threshold. Moreover, it was asserted that sustainability did not necessarily imply that renewable natural resources must be kept at the level that would provide maximum sustainable yield as suggested by the Special Rapporteur in his report. Such interpretation, applicable in fishery resources, need not be the same in the case of groundwaters since the States concerned may not wish to exploit the limit of exploitability or there may be alternative sources. Some members suggested that the concept of "economic recoverability" of the aquifer could be a possible criterion. Subparagraph (b) was considered by some members to be a creative and useful attempt to give meaning to the concept of reasonable utilization in the context of a non-recharging aquifer.

79. While welcoming the wording of draft article 6, on factors relevant to equitable and reasonable utilization, some members noted that its provisions seemed more germane in the context of the 1997 Convention. Some other members noted that the obligation to preserve aquifer resources was extant not only in respect of future generations but for the present generations as well. With regard to subparagraph (a) it was questioned whether there was a material difference between the "natural condition" of the aquifers and the taking into account of the "natural factors" as characteristics of the aquifer as suggested by the Special Rapporteur in the third report. Some members welcomed the inclusion of the factors contained in subparagraphs (b) and (c). It was suggested that one of the factors to be taken in subparagraph (c) was water for drinking purposes. Moreover, it was suggested that there should be a reference to paragraph 1 of article 9 and paragraph 1 of article 10, which also contained relevant factors.

80. Concerning draft article 7, on obligation not to cause harm, some members expressed support for the position of the Special Rapporteur that for purposes of consistency the threshold of significant harm should be maintained, noting also that such reference should be included in the title of the draft article. In the field of natural resources and the environment, harm cannot be set in absolute terms because the right of use is always weighed against the right to protect. The threshold carried certain policy considerations aimed at achieving a balance of interests. The term "significant" meant something more than trivial or detectible but which need not be serious or substantial. However, some other members felt that the threshold should be lowered to a simple reference to "harm". Any such harm to the aquifer may be difficult to reverse and could be detrimental in view of their nature and vulnerability. Moreover, the precautionary principle seemed to militate against the threshold of "significant" harm since the effects on groundwaters may take years before they became detectable. It was also contended that it would be useful for the draft articles as a whole to take into account developments that had taken place since the adoption of the 1997 Convention, in particular the adoption by the Commission in 2001 of the draft articles on prevention of transboundary harm from hazardous activities. It was therefore suggested that there should be a greater focus on prevention, before addressing the question of liability. Furthermore, some other members asserted the necessity of addressing aspects in which non-aquifer States might cause harm to an aquifer State.

81. The retention in paragraph 2 of the phrase "... have or are likely to have an impact ..." was advocated by some members. On the other hand, it was suggested that the term "adverse" should qualify such impact. Concerning paragraph 3, some members expressed support for a provision dealing with liability in the context of aquifers. In this connection, some other members doubted whether paragraph 3 in itself without additional details was sufficient. As it is, its value as a tool in the settlement of disputes was considered insignificant. Yet some other members suggested its deletion or at least the clarification of how it would operate in the context of rules of general international law. The continued application of rules of State responsibility was asserted. For example, the principles in the *Corfu Channel* case would be relevant in a situation in which an aquifer served as an instrumentality for causing harm to a neighbouring State and there existed the requisite degree of knowledge or imputability to the aquifer State. As presently drafted, "where appropriate" conveyed the impression that there was no obligation to provide compensation. It would be more appropriate to make clear that the obligation to discuss, rather than to provide compensation, presupposed that the obligation of prevention had been complied with. Elimination and mitigation of harm were applicable regardless of compliance with the obligation of prevention.

82. Concerning draft article 8, on general obligation to cooperate, support was expressed for the emphasis on the general obligation to cooperate. It was noted, however, that the inclusion of "territorial integrity" as a basis of cooperation was striking and yet the rationale for its inclusion was not clear in the third report. It was stated that it would be sufficient to base such obligation on the principles of mutual benefit and good faith. Comments were also made regarding the need for a more detailed provision on the institutional framework for the implementation of the duty to cooperate.

83. In paragraph 2, the view was expressed that the use of the word "encouraged" was rather cautious and it was suggested that bolder obligatory language should be employed. As a way to provide an administrative mechanism for implementation, the possibility of combining this paragraph with the elements of draft article 15 was also offered.

84. Some members welcomed the provisions concerning exchange of data in draft article 9. Such exchange was considered vital in facilitating the better understanding of characteristics of an aquifer. Without such information, it would be extremely difficult to establish plans and standards for utilization of aquifers. While welcoming paragraph 2, the point was made that the

rationale for its inclusion should have been explained fully. It was also suggested that paragraph 2 could appropriately be placed at the beginning or at the end of draft article 10. The formulation of the phrase "... aquifer States shall employ their best efforts to collect ..." was considered by some members as weak. It was also posited that the language of the paragraph as a whole seemed more suitable for a commentary than a draft article.

85. The provisions of draft article 10, on monitoring, were welcomed by some members. It was, however, observed that paragraph 1 was too obligatory, creating the impression that a universal obligation was being established. Such a provision would be more appropriate in the context of a bilateral or regional arrangement.

86. Doubt was expressed whether draft article 12, on protection and preservation of ecosystems, was an improvement over the corresponding article 20 of the 1997 Convention. Given the present state of knowledge on aquifers and their effects on the ecosystem, it was observed, however, that its language was too categorical. It was also wondered whether it applied, if at all, to a non-rechargeable aquifer.

87. Draft article 13, on protection of recharge and discharge zones, was considered to be an important innovation. In particular, the introduction of the concept of detrimental impact was positively perceived by some members. Moreover, it was noted that the best solution would be to create direct rights and obligations of non-aquifer States and to identify the legal and practical links with other States. Some members doubted whether there was any legal basis under general international law on which an obligation to cooperate by such non-aquifer States could be grounded.

88. As regards draft article 14, on prevention, reduction and control of pollution, some members agreed with the Special Rapporteur that the precautionary principle had not yet developed as a rule of general international law, as well as on the approach taken. However, some other members expressed regret that the Special Rapporteur had decided to take a more cautious approach regarding the precautionary principle. The language used seemed appropriate for a commentary. The principle was contained in the Rio Declaration on the Environment and Development, the International Law Association (ILA) Helsinki and Berlin Rules on Water Uses and Management as well as in various treaties. The principle was well recognized as a general principle of international environmental law and needed to be stressed in the draft articles.

89. It was also noted that the assertion by the Special Rapporteur in his report that the "objectives of draft articles were not to protect and preserve aquifers for the sake of the aquifers but to protect and preserve them so that humankind could utilize the precious water resources contained therein", should be revised because it seemed to bring connotations concerning the common heritage of humankind.

90. Some member expressed doubt whether draft article 15, on management, was an improvement over corresponding article 24 of the 1997 Convention. Since the notion of "management" was employed in a variety of ways, its use in the context of the draft articles required explanation. It was also stressed that unless particular language represented a clear improvement, the 1997 Convention language should be retained. On the other hand, it was suggested that the whole premise of draft article 15 should be reviewed. In order to avoid being faced with a default situation, the overall premise would be to require aquifer States to enter into consultations with a view to agreeing to a management plan or mechanism. Individual plans would only emerge as a fall back.

91. Some members noted that the provisions of draft article 16, on assessment of potential effects of activities, as read with draft article 17, on planned activities, were more realistic than the complicated procedures under the 1997 Convention. Such plans should take into account the interests of other aquifer States as contemplated in draft article 17. On the other hand, reservations were expressed that nine articles devoted to planned measures in the 1997 Convention could be reduced to only two draft articles. Some members felt that the language used was weak, for example, the phrase "... as far as possible ..." was preferred to "... as far as practicable ...". The importance of timely notifications in draft article 17 was stressed as already recognized in the *Lake Lanoux* arbitration. It was also noted that the requirement for an environmental impact assessment should be signalled upfront without it being implied as optional.

92. While draft article 18, on scientific and technical assistance to developing countries, seemed important and attractive from a theoretical perspective since it created a legal obligation to provide assistance, some members noted that its practical application was difficult to secure. Its inclusion might therefore be more problematic than it seemed on face value. Some other members viewed the language as too obligatory.

93. Draft article 19, on emergency situations, was seen by some members as an improvement over a corresponding provision in the 1997 Convention. However, it was noted that a more incisive analysis of the reasoning behind the changes made would have provided a better understanding of the draft article.

94. It was observed that draft article 20, on protection in time of armed conflict, and draft article 21, on data and information vital to national defence or security, contributed nothing that was new and should not be referred to the Drafting Committee. In this regard, it was noted that draft article 20 seemed more relevant in respect of surface waters. However, some other members supported draft article 21, noting that the protection should extend to industrial secrets and intellectual property, on the basis of article 14 of the draft articles on prevention of transboundary harm from hazardous activities.

95. Concerning the final provisions, the suggestion was made to include a provision on reservations.

(c) Comments on form of instrument

96. Regarding the final form of instrument, some members agreed with the Special Rapporteur that a decision on the matter should be deferred until agreement was reached on the substance. Some other members, however, observed that work could be expedited if a decision were made earlier on in the consideration of the topic, since such a decision would have a bearing on matters of both drafting and substance. As it is, in some cases, it appeared that there was already a bias towards a binding instrument.

97. Some members expressed preference for a binding instrument in the form of a framework convention. It was stressed that such a framework convention should contain guiding principles for use by States in the negotiation of their bilateral and regional arrangements. Some other members suggested that such an instrument could suitably be a protocol to the 1997 Convention. However, doubt was also expressed regarding such an approach. First, it was mentioned that the 1997 Convention had not yet entered into force and there seemed to be little support for it. Secondly, it was pointed out that although there existed a relationship, the subject matter covered by the 1997 Convention and the present topic was substantially different. Thirdly, it was noted

that the question of groundwaters affected only a certain group of States, thus an independent convention would usefully achieve the intended results beneficial to the States concerned.

98. In view of the scarcity of State practice, some members favoured the elaboration of non-binding guidelines. Such an approach would provide sufficient flexibility to aquifer States, and presented the best possibility of commanding the support of States. It was also suggested that the Commission could adopt the approach followed in respect of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, whereby non-binding principles were adopted on first reading while reserving the right to reconsider the matter as to the final form of instrument at the second reading in the light of the comments and observations of Governments. It was also noted that such guidelines could take the form of a resolution.

3. Special Rapporteur's concluding remarks

99. Concerning whether the topic was ripe for codification, the Special Rapporteur recalled that the 2000 decision of the Commission to include the topic in its programme of work was based on an assessment made on its viability. While his previous reports might have contributed in creating an impression that there was insufficient evidence of State practice for codification, there had been an upsurge of practice of States in the subject matter in recent years. There were many cooperative efforts in Africa, the Americas and Europe, with State practice, agreements, arrangements and doctrine emerging, sufficient for the Commission to embark on work on the subject. The Commission would be embarking upon an exercise in the progressive development and codification of the law on groundwaters. Groundwaters represented 97 per cent of the available freshwater resources, and, in recent years, dependency on such waters had increased and problems were being confronted regarding their exploitation and pollution of aquifers. Since groundwaters would be one of the major issues to be discussed at the Fourth World Water Forum in Mexico in 2006, it was a challenge to the Commission to respond quickly in order to keep apace with a rapidly developing field.

100. Without prejudging the decision of the Commission on the other sub-topics relating to oil and gas, the Special Rapporteur noted that there were many similarities with groundwaters. The elaboration of draft articles on groundwaters would have implications on oil and gas and

conversely State practice on oil and gas has a bearing on groundwaters. While it was feasible to embark on a first reading of draft articles on groundwaters without considering oil and gas, it would be necessary to give due attention to the relationship before completing the second reading.

101. As regards whether permanent sovereignty over natural resources should be treated in the preamble or in a separate article, the Special Rapporteur noted that there were precedents for both approaches. The preambular approach which he had suggested found precedent in the draft articles on the prevention of transboundary harm from hazardous activities as well as the Vienna Convention for Protection of the Ozone Layer, the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity. On the other hand, the United Nations Convention on the Law of the Sea had a separate article 193 on permanent sovereignty, which he would study further.

102. On the relationship between the draft articles and general international law, the Special Rapporteur observed that it was in the nature of international law that the general international law has parallel application with treaties. This could be affirmed in the preamble as in the United Nations Convention on Jurisdictional Immunities of States and Their Property, the Vienna Convention on Consular Relations and the Vienna Convention on Diplomatic Relations or in a separate article as evidenced in article 56 of the draft articles on the Responsibility of States for internationally wrongful acts.

103. Concerning the precautionary principle, the Special Rapporteur noted that he was aware that it had been incorporated in various legally binding instruments. However, in his view, such provisions were neither declaratory of customary international law nor constitutive of new custom. At any rate, the important task for the Commission was to spell out the measures to be implemented for the management of aquifers that would give effect to the principle.

104. With regard to the suggestion for elaborate provisions on obligations of non-aquifer States, the Special Rapporteur stressed the need to be realistic. If a binding instrument were to be the preferred option, it was very likely that only aquifer States would become party to such an instrument. There would be no real incentive for non-aquifer States to join such an instrument without any *quid pro quo* that would justify their assumption of obligations.

105. Concerning the obligation not to cause harm in draft article 7, the Special Rapporteur clarified that the draft article was not concerned with the question of State responsibility. Rather it was concerned with activities not prohibited by international law, namely the utilization of transboundary aquifers. Such activities are essential and legitimate for human survival and their adverse effect is often tolerated to a certain degree hence the need for the threshold. While paragraph 1 addressed aspects concerning the obligation of prevention, paragraph 3 deals with the eventuality where significant harm is caused in spite of the fulfilment of the duty of due diligence.

106. The Special Rapporteur acknowledged that there was no provision relating to institutional mechanisms and management of transboundary aquifers in the draft articles. Unlike the case of international watercourses, where there was a long history of international cooperation, in the case of groundwaters, the Franco-Swiss Genevese Aquifer Authority seemed to be the only fully functioning international organization. While various cooperative organizational arrangements were emerging, paragraph 2 of draft article 8, recommends the establishment of joint mechanisms and joint commissions. The Special Rapporteur also noted that while there was no objection to including a provision on disputes settlement similar to article 33 of the 1997 Convention, he perceived article 33 to be devoid of substance since it did not provide for compulsory jurisdiction. The compulsory reference to impartial fact-finding in paragraph 3 of article 33 has been reflected in paragraph 2 of draft article 17 to assist in resolving differences concerning the effect of planned activities.

107. The Special Rapporteur also responded to some comments made on specific draft articles and offered to provide fuller explanations in his analysis of the various provisions of the draft articles in the commentary.

CHAPTER V

EFFECTS OF ARMED CONFLICTS ON TREATIES

A. Introduction

108. The Commission at its fifty-second session (2000), identified the topic "Effects of armed conflicts on treaties" for inclusion in its long-term programme of work.[27] A brief syllabus describing the possible overall structure and approach to the topic was annexed to that year's report of the Commission.[28] In paragraph 8 of its resolution 55/152 of 12 December 2000, the General Assembly took note of the topic's inclusion.

109. During its fifty-sixth session, the Commission decided, at its 2830th meeting, on 6 August 2004, to include the topic "Effects of armed conflicts on treaties" in its current programme of work, and to appoint Mr. Ian Brownlie as Special Rapporteur for the topic.[29] The General Assembly, in paragraph 5 of its resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

B. Consideration of the topic at the present session

110. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/552) as well as a memorandum prepared by the Secretariat entitled, "The effect of armed conflict on treaties: an examination of practice and doctrine" (A/CN.4/550 and Corr.1).

111. The Commission considered the Special Rapporteur's report at its 2834th to 2840th meetings, from 6 to 18 May 2005.

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[27] See *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729.

[28] Ibid., annex.

[29] Ibid., *Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364.

112. At its 2866th meeting, on 5 August 2005, the Commission endorsed the Special Rapporteur's suggestion that the Secretariat be requested to circulate a note to Governments requesting information about their practice with regard to this topic, in particular the more contemporary practice as well as any other relevant information.

1. General remarks on the topic

(a) Introduction by the Special Rapporteur of his first report

113. The Special Rapporteur observed that he had produced an entire set of draft articles providing an overall view of the topic and of the issues that it involves, in order to assist the Commission and Governments with commenting, including providing State practice, on the topic. The basic policy underlying the draft articles was to clarify the legal position and to promote and enhance the security of legal relations between States (thereby limiting the occasions on which the incidence of armed conflict had an effect on treaty relations).

114. The Special Rapporteur further pointed to the concerns expressed by writers regarding the uncertainty attending the subject: the nature of the sources presented problems, the subject was dominated by doctrine, and practice was sparse with much of it being more than 60 years old. As regards the latter concern, in his view, it was not necessarily the case that policy perspectives on the effect of armed conflict had changed qualitatively since 1920. Instead, the key change in the inter-war period had been the gradual shift towards pragmatism and away from the view that the incidence of armed conflict was beyond the realm of law and more or less non-justiciable.

115. The Special Rapporteur explained that the draft articles were intended to be compatible with the Vienna Convention on the Law of Treaties.[30] There was a general assumption that the subject matter under examination formed a part of the law of treaties, not a development of the law relating to the use of force; it being recalled that the Vienna Convention, in article 73, had expressly excluded the subject.

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[30] United Nations, *Treaty Series*, vol. 1155, p. 331.

116. The Special Rapporteur further acknowledged that the subject of peaceful settlement of disputes was missing from the draft articles. To his mind, it was not a good idea to look at the question of the peaceful settlement of disputes until the work on the substantive draft was near completion, since there existed a close relationship between the matters of substance and the type of dispute settlement mechanism which would be appropriate.

(b) Summary of the debate

117. Members expressed support for the Special Rapporteur's decision to provide an entire set of draft articles. Reference was also made to the memorandum prepared by the Secretariat, which was considered extremely helpful in understanding the substance and complexity of the issues at hand.

118. Some members were of the view that the Special Rapporteur's report was too concise in that it provided little guidance as to how the solutions proposed related to past or existing State practice. It was pointed out that a thorough analysis of available practice could prove catalytic by inducing States to produce possibly divergent practice. Similarly, the relative lack of discussion in the report of the underlying policy considerations was regretted.

119. Some members pointed out that the draft articles should be compatible with the purposes and principles of the Charter of the United Nations. In particular, they should take into consideration the illicit (wrongful) character of recourse to force in international relations and the fundamental distinction between aggression and legitimate individual or collective self-defence or the use of force in the context of the collective security system established by the United Nations.

120. Issue was taken with some of the views expressed in the report including the statement that "[i]t is generally recognized that the municipal decisions are 'not of great assistance'".[31] It was observed that, while they were not always consistent, which could also be said of available State practice, municipal court decisions provided helpful evidence of State practice, of the

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[31] Para. 44 of document A/CN.4/552 citing the views of Herbert W. Briggs, *The Law of Nations: Cases, documents and Notes*, 2nd ed. (London: Stevens, 1953), p. 943.

intention of parties in respect of certain kinds of treaties and of the effect of the nature of a conflict on the survival of the treaty. The importance of municipal case law was borne out by the Secretariat memorandum which referred to a number of such decisions.

121. Support was expressed for the Special Rapporteur's desire to encourage continuity of treaty obligations in armed conflict in cases where there was no genuine need for suspension or termination, as well as for the view that the Commission should not be bound by some of the rigid doctrines of the past that would inhibit such continuity. At the same time, the view was expressed that the effect of an armed conflict on treaties would depend more on the particular provisions and circumstances in question than on any general rules that might be articulated, and that it could be more effective to identify the considerations that States must take into account rather than to lay down definitive rules or categorizations that States must always follow.

122. Support was also expressed for approaching the topic within the context of the Vienna Convention on the Law of Treaties. Others felt it was not necessary to specify the location of the topic within the broader field of international law. Reference was also made to the fact that it was in the nature of the topic that it had undergone significant developments over time owing to changes in the formalities and modalities of modern armed conflict as well as in the international legal regime governing the recourse to armed force, particularly since World War II.

123. Various suggestions were made as to the way forward, including referring the draft articles (or only some) to the Drafting Committee, establishing a working group to consider the more contentious articles, or simply not taking any action at that stage so as to allow the Special Rapporteur the time to reflect further on the observations made in the Commission as well as any contributions that may be received from States. It was also suggested that a questionnaire be prepared for circulation among member Governments.

(c) Special Rapporteur's concluding remarks

124. The Special Rapporteur reiterated the overall goals of his report, as enumerated during his introduction, and recalled that his chosen method of work was to provide a complete set of

draft articles without prejudice to their final form. However, he clarified that the recourse to draft articles should not give rise to the assumption that he was rushing to judgement. He noted that the normative form had been accompanied by elements of open-mindedness and that he had deliberately left open several issues for the formation of collective opinion within the Commission. He also recalled that the draft articles enjoyed a provisional character and had been provided with a view to soliciting information (especially as to evidence of State practice) and opinions from Governments.

125. As regards the sources employed, the Special Rapporteur admitted that more reference to doctrine was called for. As for municipal cases, he clarified that it was not that he thought that they were of little value, but only that they tended to be contradictory. He also observed that domestic case law called for careful assessment: it was necessary to distinguish between those legal decisions where the court actually adverted to public international law as an applicable law from those cases where the court approached the legal problems at hand from the standpoint of municipal law exclusively. Similarly, the practice of international tribunals, when analysed carefully, was also not always very helpful.

126. The Special Rapporteur further identified several policy questions requiring consideration in the future, including the question of the applicable *lex specialis*[32] which could be referred to in the draft articles, as well as the question of introducing a distinction between bilateral and multilateral treaties. To his mind, however, there seemed to be no good case for seeking to design special criteria for the two categories. The principle of intention appeared to provide the general criterion.

127. Given the preliminary nature of the first report, the Special Rapporteur opposed the referral of draft articles to the Drafting Committee or the establishment of a working group. Instead, he suggested that a request be circulated to Governments requesting information about their practice with regard to this topic, in particular, the more contemporary practice.

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[32] See the discussion on draft article 5, below.

2. Article 1. Scope[33]

(a) Introduction by the Special Rapporteur

128. The Special Rapporteur explained that draft article 1 was based on the formulation of article 1 of the Vienna Convention.

(b) Summary of the debate

129. Comments on article 1 were limited to suggestions for expansion of the scope of the topic. For example, several members supported the inclusion of treaties entered into by international organizations. Examples cited were regional integration treaties and treaties dealing with the privileges and immunities of the officials and staff of international organizations, especially in the context of peacekeeping operations undertaken during times of armed conflict. It was also noted that the Institute of International Law, in article 6 of its resolution II of 1985 entitled "[t]he effects of armed conflicts on treaties",[34] had included treaties establishing an international organization. In terms of another view, the inclusion of international organizations was not entirely necessary. Reference was further made to article 74, paragraph 1, of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986.[35]

130. It was suggested that a distinction be made between contracting parties, under article 2, paragraph (1) (f), of the Vienna Convention, and those which are not. While some members preferred including treaties which had not yet entered into force, others suggested that only treaties in force at the time of the conflict, should be covered by the draft articles.

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[33] Draft article 1 reads as follows:

Scope

The present draft articles apply to the effects of an armed conflict in respect of treaties between States.

[34] *Yearbook of the Institute of International Law*, vol. 61 (II) (1986), at pp. 278-283.

[35] See *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations*, vol. II (United Nations publication, Sales No. E.94.V.5).

131. In terms of a further suggestion, the provision on scope could exclude the specific category of treaties prescribing the rules of warfare or rules of engagements, such as The Hague and Geneva Conventions. As such treaties become operative only during armed conflicts, they would not fall under the categories of treaties described in draft Article 7, paragraph 1, as the logic of "continue in operation during an armed conflict" in that paragraph would be inapplicable.

(c) Special Rapporteur's concluding remarks

132. The Special Rapporteur, referring to the suggestion that the draft articles cover treaties with international organizations, stated that while he shared some of the doubts expressed he would not oppose their inclusion.

133. Regarding the question of the relationship of the draft articles to other areas of international law, which had been referred to by some members in the context of specific articles, the Special Rapporteur advised caution: it was necessary to avoid simply adding other topics of international law onto the draft without good cause. He agreed that a certain amount of overlap existed with such topics as the use of force.[36] However, he was not troubled by the existence of situations where the same subject matter responded to multiple classification. However, he acknowledged that care had to be taken not to affect issues of the ordinary law of treaties so as to avoid problems of compatibility with the law of treaties. He recalled further that some members had suggested, during the discussion on the lawful resort to the use of force (in the context of draft article 10), that account needed to be taken of the application of principles of *jus cogens*. He wondered, however, whether it was desirable to embark on a codification of *jus cogens* as a by-product of the topic under consideration. He did not even think it necessary to include a proviso for principles of *jus cogens*, since that would require defining which principles were being referred to. He also noted a suggestion that reference be made to principles of State responsibility in the draft articles. In his view, however, such principles stood in the background and were not part of the current project.

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[36] See the discussion on draft article 10, below.

3. Article 2. Use of terms[37]

(a) Introduction by the Special Rapporteur

134. The Special Rapporteur recalled that draft article 2 defined the terms "treaty" and "armed conflict" in its paragraphs (a) and (b), respectively. The definition of "treaty" followed that set out in the Vienna Convention[38] while the definition of "armed conflict" was based on the formulation adopted by the Institute of International Law in its 1985 resolution. He recalled that when the topic had first been proposed for inclusion in the Commission's agenda, concerns had been expressed that it would lead to a general academic exposition of the concept of armed conflict. He hoped that the Commission would be satisfied with a working definition to be applied contextually, as opposed to attempting an unnecessarily complex codification. Although not comprehensive, the Special Rapporteur was of the view that the definition adopted by the Institute of International Law was preferable since it took a contextual approach.

135. The Special Rapporteur referred to a further general question of policy, namely whether or not armed conflict should also include internal conflicts. He expressed a preference for restricting, rather than extending, the situations in which armed conflict could interrupt the treaty relations among States; and, therefore, favoured excluding non-international armed conflict. At the same time, he was aware of the view that internal armed conflicts could involve

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[37] Draft article 2 reads as follows:

Use of terms

For the purposes of the present draft articles:

(*a*) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation;

(*b*) "Armed conflict" means a state of war or a conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.

[38] Article 2 (1) (a).

external elements and thereby affect the operation of treaties as much as, if not more than, international armed conflicts. The wording of paragraph (b) had left the question unresolved.

(b) Summary of the debate

136. As regards paragraph (a), it was pointed out that the term "treaty" had already been defined in three treaties: the Vienna Convention on the Law of Treaties of 1969; the Vienna Convention on Succession of States in Respect of Treaties of 1978[39] and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986.[40] The view was expressed that such a definition was not needed in the present draft articles.

137. Concerning paragraph (b), agreement was expressed with the Special Rapporteur's suggestion that the Commission not embark on a comprehensive definition of armed conflict. The view was expressed that the threshold contained in paragraph (b), namely the test of "nature or extent" of the conflict was too general. The view was also expressed that the definition, which referred to the conflict "likely to affect the operation of treaties ..." was circular in that it was for the draft articles to determine whether the operation of a treaty was to be affected or not.

138. As for the scope of the definition of "armed conflict", support was expressed for the inclusion of blockades (although some members expressed doubts), as well as military occupation unaccompanied by protracted armed violence or armed operations,[41] even if this was not easy to reconcile with the express reference to "armed operations". It was queried whether such express reference to "armed operations" included broader conflicts such as the Arab-Israeli conflict. Concern was also expressed that the formulation employed could apply to situations falling outside the ordinary concept of armed conflict, such as violent acts by drug cartels, criminal gangs, and domestic terrorists.

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[39] Article 2 (1) (a). United Nations, *Treaty Series*, vol. 1946, p. 3.

[40] Ibid.

[41] Further reference was made to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, United Nations, *Treaty Series*, vol. 249, p. 240, which made provision for the situation of occupation.

139. Different views were expressed as to the appropriateness of including the effects on non-international armed conflicts on treaties within the scope of the topic. Several members spoke in favour of such inclusion, noting, inter alia, that the guiding criterion on this point should be that of the relevance of the draft articles in the context of the kind of armed conflicts occurring in the present era in which the distinction between international and internal armed conflicts was often blurred. It was noted that the effects of the two types of conflicts on treaties would not necessarily be the same, and accordingly should be considered. Others expressed reservations as to making such a distinction between the two types of conflict. It was suggested that the matter could be dealt with separately, even as a new topic of its own.

140. Suggestions for reformulating the provision, included: adopting a definition which simply stated that the articles applied to armed conflicts, whether or not there existed a declaration of war, without going further; or taking as a basis the definition adopted in the *Tadić* case,[42] namely that "... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State". It was also suggested that account should be taken of the provisions of the Rome Statute of the International Criminal Court of 1998.[43] As for drafting, it was suggested that the words "for the purposes of the present draft articles ..." be included so as to limit the scope of the definition; that a reference to international organizations be made; and that the question of the relationship with third parties be examined also within the context of paragraph (b). Others queried whether a definition was even needed, and pointed to the fact that those multilateral treaties which contained a reference to "armed conflict" did not define it.

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[42] Case IT-94-1, *Prosecutor v. Duško Tadić a/k/a "DULE"*, Appeals Chamber, 2 October 1995 (1994-1995), 1 ICTY JR 352, at para. 70. See also 35 I.L.M. (1996) 32.

[43] United Nations, *Treaty Series*, vol. 2187, p. 3.

(c) Special Rapporteur's concluding remarks

141. The Special Rapporteur observed that while a majority in the Commission had favoured including non-international armed conflict within the definition of "armed conflict", many did not favour attempting to redefine the concept of armed conflict in the draft articles. He recalled that there were also suggestions along the lines of a simpler formulation stating the articles applied to armed conflicts whether or not there was a declaration of war, without proceeding further.

4. Article 3. Ipso facto termination or suspension[44]

(a) Introduction by the Special Rapporteur

142. The Special Rapporteur characterized draft article 3 as being primarily expository in nature: in the light of the wording of subsequent articles, particularly draft article 4, it was not strictly necessary. Its purpose was merely to emphasize that the earlier position, according to which armed conflict automatically abrogated treaty relations, had been replaced by a more contemporary view according to which the mere outbreak of armed conflict, whether declared war or not, did not ipso facto terminate or suspend treaties in force between parties to the conflict. He would, however, not oppose the deletion of the provision if the Commission so desired. Its formulation was based on article 2 of the resolution adopted by the Institute of International Law in 1985.

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[44] Draft article 3 reads as follows:

Ipso facto termination or suspension

The outbreak of an armed conflict does not ipso facto terminate or suspend the operation of treaties as:

(*a*) Between the parties to the armed conflict;

(*b*) Between one or more parties to the armed conflict and a third State.

(b) Summary of the debate

143. While support was expressed for the Special Rapporteur's proposal, some members pointed out that there existed examples of instances of practice, referred to both in the Special Rapporteur's report and the Secretariat's memorandum, that appeared to suggest that armed conflicts cause the automatic suspension of various categories of treaty relations, in whole or in part. Indeed, it was suggested that the articles should not rule out the possibility of automatic suspension or termination in some cases. In terms of another suggestion, the provision could simply state that the outbreak of armed conflict did not necessarily terminate or suspend the operation of any treaty.

144. It was further suggested that a distinction be made between termination and suspension: an armed conflict would not ipso facto terminate the treaty between the parties to the armed conflict themselves, but the suspension of the operation of treaties between the parties to the armed conflict would be governed along the lines proposed by the Institute of International Law in articles 7 and 9 of its resolution of 1985.[45]

145. In terms of a further proposal, the position of third parties could be clarified, particularly whether the situation may be different vis-à-vis third parties from that prevailing between parties to the conflict. One suggestion was to clarify in the text that, with regard to effects for third States, the ordinary rules in the Vienna Convention on the Law of Treaties such as those relating to fundamental change of circumstance and supervening impossibility of performance would apply.

146. Agreement was also expressed with the Special Rapporteur's proposal, made in his report, to replace the phrase "ipso facto" with "necessarily", although some members were comfortable with the former phrase. Other suggestions included inserting a reference to international organizations in the context of draft article 3.

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[45] See the discussion on draft article 10, below.

(c) Special Rapporteur's concluding remarks

147. The Special Rapporteur recalled that he had not strongly supported the draft article from the beginning. However, he was of the view that article 3, with improved wording (including replacing "ipso facto" with "necessarily") should be kept. He noted that many members considered article 3 to be the point of departure of the whole draft and that it reflected the basic principle of continuity. He also took note of the various drafting suggestions that were made.

148. With regard to the position of third parties, he observed that the distinction between third party relationships and the relation between parties to the armed conflict themselves was only significant within the framework of the criterion of intention. It was that criterion which would govern relations between belligerents and neutrals, although he conceded that the relevant practice had to be checked in order to see whether there existed the possibility of different solutions. He noted that the point applied equally to draft article 4.

5. Article 4. The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict[46]

(a) Introduction by the Special Rapporteur

149. The Special Rapporteur observed that there existed in the literature four basic rationales regarding the effects of armed conflicts on treaties: (1) that war was the polar opposite of peace

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[46] Draft article 4 reads as follows:

The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict

1. The susceptibility to termination or suspension of treaties in case of an armed conflict is determined in accordance with the intention of the parties at the time the treaty was concluded.

2. The intention of the parties to a treaty relating to its susceptibility to termination or suspension shall be determined in accordance:

(*a*) With the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

(*b*) The nature and extent of the armed conflict in question.

and involved a complete rupture of relations and a return to anarchy; it therefore followed that all treaties were annulled without exception and that the right of abrogation arose from the occurrence of war regardless of the original intention of the parties; (2) that the test was compatibility with the purposes of the war or the state of hostilities, i.e. that treaties remained in force subject to the necessities of war; (3) that the relevant criterion was the intention of the parties at the time they had concluded the treaty; and (4) that since 1919, and especially since the appearance of the Charter of the United Nations, States no longer possessed a general competence to resort to the use of force, except in case of legitimate defence and it therefore followed that the use of force should not be recognized as a general solvent of treaty obligations. In his view, the third rationale was the most workable and the most representative of the existing framework of international law.

150. Noting that draft article 4 was a key provision, the Special Rapporteur observed that modern doctrine contained two main streams of opinion: (1) that the intention of the parties is the solution to the problem of the effect of the outbreak of war, and (2) that the doctrine of *caducité*, which featured prominently in French-language sources, consisting of an amalgam between the earlier and more recent positions according to which the effect of war was to terminate treaty relations, though with some important exceptions based upon intention or inferences of intention. He was, however, of the view that it was inherently contradictory to say that armed conflict was qualitatively incompatible with treaty relations and was therefore non-justiciable while at the same time saying that there could be exceptions to that rule, the test being the object and purpose of the treaty. In the final analysis, however, both approaches seemed to his mind to end with the notion of intention; and therefore draft article 4 sought to universalize the test of intention, with regard both to the nature of the treaty itself and to the nature and extent of the armed conflict in question.

(b) Summary of the debate

151. On the four basic theories outlined by the Special Rapporteur as possibly governing the effect of armed conflict on treaties, several members commented on the Special Rapporteur's

choice of the criterion of the intention of the parties. The view was expressed that the Special Rapporteur had not sufficiently explained why he could not support some of the other theories. For example, it was suggested that the criterion based on compatibility with the armed conflict was an important one, and that traces of it were to be found in some of the draft articles proposed by the Special Rapporteur. It was noted by some members that the principle of the prohibition of the resort to the use of force was essential.

152. As for the proposed criterion of intention, while some members expressed support, others were of the view that it was vague, subjective or non-existent and that it raised complex issues of the application of the Vienna Convention. It was also considered problematic since there normally was no actual intent at the time of conclusion. When concluding a treaty, States rarely reflect on the effect any possible armed conflict might have on it. This is particularly the case of treaties after World War II. It was suggested that if the purpose of selecting intention as the criterion was to establish a presumption, then that should be provided for in a different manner. Others were less critical of the concept, because it took into account the contextual factors in a particular situation and thereby allowed a more realistic and sensitive regulation of the matter.

153. It was suggested that while the intention of the parties was the most important criterion, there were other relevant criteria, and that the draft articles should avoid maintaining one exclusive criterion. Indeed, it was recalled that, in effect, the criteria for determining intention were the object and nature and extent of the armed conflict (in paragraph 2 (b)); the existence of an express provision in the treaty (art. 5, para. 1); and the object and purpose of the treaty (art. 7, para. (1) read together with paragraph (2) providing examples of pertinent categories of treaties). In terms of another suggestion, the object and purpose test could serve as the general guideline. Alternatively, it was proposed that the draft articles simply provide that the general criteria apply when the treaty does not provide otherwise. In terms of yet another view, it was also important to consider subsequent actions in the application of the treaty, including those after the outbreak of the conflict.

154. As regards paragraph 2, doubts were expressed about the relevance of the two sets of criteria suggested for determining the intention of the parties. It was also suggested that the logic of the subparagraph (a) was circular: it was suggesting that to establish the intention of the parties one needs to base oneself on the intention of the parties. It was also noted that reference to articles 31 and 32 of the Vienna Convention was of limited use if there was no express intention at the time of conclusion. Support was further expressed for adding the criterion of the nature of the treaty as an additional criterion under paragraph 2.

(c) Special Rapporteur's concluding remarks

155. The Special Rapporteur noted that the question of the criterion of intention had been the subject of much debate, and that several members had indicated major concerns, especially as regards the familiar problems of proof. At the same time, he recalled that the majority of the opinions expressed did not propose the replacement of intention by some other major criterion. He announced his intention to undertake a fuller examination of these issues in the second report, but cautioned that there was no avoiding the concept of intention since, for better or worse, it was the basis of international agreements. He pointed further to the complexity of the elements of intention relating to draft article 4, as had been raised in the debate. In particular, it seemed obvious that the nature and extent of the conflict in question were necessary criteria since the criterion of intention was applied not in the abstract but within a particular context. As such, he maintained that a sense of proportion was called for, since there was no simple solution to the problem of proving intention.

156. The Special Rapporteur further indicated that the debate had revealed a need for greater clarity as to the relation between draft articles 3 and 4 (including the possibility that they may be amalgamated), and that article 4 needed further development as regards the effects of termination or suspension.

6. Article 5. Express provisions on the operation of treaties[47]

(a) Introduction by the Special Rapporteur

157. Draft article 5 dealt with the situation where treaties expressly applicable to situations of armed conflict remained operative in case of an armed conflict and the outbreak of an armed conflict did not affect the competence of the parties to the armed conflict to conclude treaties. The Special Rapporteur pointed to well known examples of belligerents in an armed conflict concluding agreements between themselves during the conflict, and noted that the principles enunciated in the draft article were also supported by the relevant literature.

(b) Summary of the debate

158. General support was expressed for the provision. The point was made that while the provision was, in a sense, obvious and superfluous, it could nonetheless be included for the sake of clarity.

159. Concerning paragraph 1, reference was made to the principle enunciated in the *Nuclear Weapons* Advisory Opinion that, while certain human rights and environmental principles do not cease in time of armed conflict, their application was determined by "the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities".[48] It was suggested that this principle be reflected in the draft articles. It was likewise suggested that reference be made to peremptory norms of

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[47] Draft article 5 reads as follows:

Express provisions on the operation of treaties

1. Treaties applicable to situations of armed conflict in accordance with their express provisions are operative in case of an armed conflict, without prejudice to the conclusion of lawful agreements between the parties to the armed conflict involving suspension or waiver of the relevant treaties.

2. The outbreak of an armed conflict does not affect the competence of the parties to the armed conflict to conclude treaties in accordance with the Vienna Convention on the Law of Treaties.

[48] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports*, 1996, p. 226 at 240, para. 25.

international law applicable during times of armed conflict. In addition, the inclusion of the qualifier "lawful" was queried.

160. As regards paragraph 2, the view was expressed that its relationship with paragraph 1 was not clear. It was also suggested that the reference to "competence" of the parties to the armed conflict to conclude treaties be replaced by the word "capacity".

(c) Special Rapporteur's concluding remarks

161. The Special Rapporteur noted that the provision, which complemented article 3, was uncontroversial. As for the reference to the word "lawful" in relation to agreements made between States which were already in a situation of armed conflict, he recalled that there existed examples of situations where pairs of States which were at war with each other, nonetheless entered into special agreements during the state of war; even agreements which purported to modify the application of the law of war. Hence the term "lawful" was included so as to ensure that such agreements would be in conformity with international public policy. The issue would be elaborated further in the commentary. The Special Rapporteur agreed that the principle enunciated in the *Nuclear Weapons* Advisory Opinion should be appropriately reflected.

7. Article 6. Treaties relating to the occasion for resort to armed conflict[69]

(a) Introduction by the Special Rapporteur

162. The Special Rapporteur explained that draft article 6 dealt with the specialized question of treaties relating to the occasion for resort to armed conflict. He remarked that, although some earlier authorities had held the opinion that in cases in which an armed conflict was caused by differences as to the meaning or status of a treaty, the treaty could be presumed to be annulled, the more contemporary view was that such a situation did not necessarily mean that the treaty

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[69] Draft article 6 reads as follows:

Treaties relating to the occasion for resort to armed conflict

A treaty, the status or interpretation of which is the subject matter of the issue which was the occasion for resort to armed conflict, is presumed not to be terminated by operation of law, but the presumption will be rendered inoperable by evidence of a contrary intention of the contracting parties.

in question would lose its force. The practice of States confirmed that, during the process of peaceful settlement of disputes, the existing treaty obligations remained applicable.

(b) Summary of the debate

163. While some agreement with the provision was expressed, others voiced some doubts as to the compatibility of draft article 6 with contemporary international law. It was noted that the subject matter of the provision depended much on the context and prevailing circumstances and that the more applicable principle would be that of the peaceful settlement of disputes. In terms of a further view, the very fact that the contracting parties had to resort to an armed conflict suggested that at least one of the contracting parties disagreed with the substance or continuance of the treaty. Alternatively, the provision could apply in situations where the dispute concerned the interpretation of the treaty and not the validity of the treaty in its entirety.

164. The view was also expressed that draft article 6 was, strictly speaking, not necessary in the light of draft article 3 whereby no treaty is ipso facto terminated or suspended by the outbreak of armed conflict: that would include a treaty whose interpretation may be the occasion for a conflict. The matter could, accordingly, equally be dealt with in the commentary to Article 3.

(c) Special Rapporteur's concluding remarks

165. The Special Rapporteur observed that the draft article had proved to be problematical, with justification. He explained that, in his view, it was unreasonable to presume that a treaty which served as the basis of an armed conflict, and, which later was the subject of some process in accordance with law, should be assumed to be annulled. However, he conceded that the draft article was redundant in view of the earlier provisions of the draft.

166. It was further announced that the commentary to the draft article would be amended to include more apposite material, including the *Ethiopia-Eritrea Boundary Commission decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Republic of Ethiopia* of 13 April 2002.[50]

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[50] *41 I.L.M.* (2002), p. 1057.

8. Article 7. The operation of treaties on the basis of necessary implication from their object and purpose[51]

(a) Introduction by the Special Rapporteur

167. The Special Rapporteur observed that draft article 7 dealt with the species of treaties the object and purpose of which involved the necessary implication that they would continue in

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[51] Draft article 7 reads as follows:

The operation of treaties on the basis of necessary implication from their object and purpose

1. In the case of treaties the object and purpose of which involve the necessary implication that they continue in operation during an armed conflict, the incidence of an armed conflict will not as such inhibit their operation.

2. Treaties of this character include the following:

(*a*) Treaties expressly applicable in case of an armed conflict;

(*b*) Treaties declaring, creating, or regulating permanent rights or a permanent regime or status;

(*c*) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;

(*d*) Treaties for the protection of human rights;

(*e*) Treaties relating to the protection of the environment;

(*f*) Treaties relating to international watercourses and related installations and facilities;

(*g*) Multilateral law-making treaties;

(*h*) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

(*i*) Obligations arising under multilateral conventions relating to commercial arbitration and the enforcement of awards;

(*j*) Treaties relating to diplomatic relations;

(*k*) Treaties relating to consular relations.

operation during an armed conflict. Paragraph 1 established the basic principle that the incidence of armed conflict would not, as such, inhibit the operation of those treaties. Paragraph 2 contained an indicative list of some such categories of treaties. It was observed that the effect of such categorization was to create a set of weak rebuttable presumptions as to the object and purpose of those types of treaties, i.e. as evidence of the object and purpose of the treaty to the effect that it survives a war. He clarified that while he did not agree with all the categories of treaties in the list, he had nonetheless included them as potential candidates for consideration by the Commission. The list reflected the views of several generations of writers and was to a considerable extent reflected in available State practice, particularly United States practice dating back to the 1940s. While closely linked to articles 3 and 4, the draft article was primarily expository and could accordingly be excluded.

168. While there was a case for the inclusion of treaties for the protection of human rights, especially in the light of the inclusion of friendship, commerce and navigation and analogous agreements concerning private rights such as bilateral investments treaties, he was not entirely persuaded. Similarly, in the case of environmental law treaties, he noted that while there were some important pieces of law taken individually and some important standard-setting treaties, there was no unified law for the protection of the environment, and therefore there was no single position as to whether the incidence of armed conflict affected environmental treaties.

(b) Summary of the debate

169. A range of views were expressed in connection with paragraph 1. It was observed that the intention of the parties and the object and purpose of the treaty were different criteria and that it was difficult to establish a general criterion exactly because the applicable considerations were primarily contextual in nature. What seemed pertinent was more the type of the conflict rather than the intention of the parties. The view was also expressed that the emphasis was better placed on the nature of the treaty, as opposed to its object and purpose. Still others supported the criterion of object and purpose, particularly because of its connection to the Vienna Convention. Other suggestions included having a more general formulation such as: "in principle, provisions of a treaty continue to apply depending on their viability, taking into account the context of the armed conflict and depending on the position of the party on the legality of the conflict".

170. Concerning paragraph 2, while some support was expressed for the inclusion of an indicative list, several members expressed doubts. It was observed that treaties do not fall into neat categories and that, for example, bilateral treaties often include aspects of several different fields of law; that even within a particular category, some provisions of a treaty may logically be of a nature as to be subject to suspension during armed conflict, while other provisions of the same treaty may not; that even with respect to particular types of provisions, the language of a treaty and the intention of its parties could differ from that of similar provisions in other treaties; that State practice was not consistent in most areas and did not lend itself to yes-or-no answers as to whether a category of treaties may or may not be suspended or terminated; and that it could be difficult to reach a reasonable consensus within the Commission or among States on such a catalogue of treaties. The view was also expressed that, strictly speaking, the list was not necessary in light of the application of the general criterion of intention, i.e. if the intention is known, an indicative list is not necessary. It was further suggested that the list could be included in the commentary.

171. As regards subparagraph (a), the view was expressed that this category was unnecessary as it was already covered by draft article 5. In addition, the category in subparagraph (b) seemed ambiguous, as it was not clear what rights and obligations were "permanent" and which sets of such rights and obligations amounted to a "regime" or "status". Furthermore, some provisions of those types of treaties could be inconsistent with the obligations and rights of occupying powers in armed conflict and, as such, would need to be temporarily suspended. The view was also expressed that subparagraph (c) provided a good example of treaties that contained some provisions that should ordinarily continue during armed conflict (such as the personal status and property rights of foreign nationals), as well as other provisions which might need to be suspended under some circumstances (such as the conduct of navigation and commerce between States engaged in armed conflict).

172. The view was expressed that the category of treaties in subparagraph (d) was one in which there probably was a good basis for continuity, subject to the admonition of the International Court of Justice, in the *Nuclear Weapons* Advisory Opinion, that such rights were to be applied in accordance with the law of armed conflict.[52] Doubts were expressed as to the

[52] See the discussion on draft article 5, above.

existence of a general presumption of continuity for the entire category in subparagraph (e), in the light of the fact that many environmental treaties imposed very specific technical limitations that could be inconsistent with the legitimate requirements of military operations in armed conflict in some situations. Others supported the inclusion of the category by way of progressive development of international law. It was also suggested that treaties relating to groundwaters could be included.

173. On the category of treaties in subparagraph (f), doubts were also expressed whether there could be any general presumption of continuity, given that it could be imperative in wartime to prevent or restrict air or sea traffic to or from an enemy State. Concerning subparagraph (g), it was observed that it was not self-evident what might constitute a "law-making" treaty, given the fact that all treaties create law, and that many of such treaties had provisions regarding personal rights that should be continued, together with other provisions that might be incompatible with the requirements of armed conflict and might have to be temporarily suspended. Other suggestions for additional categories included treaties establishing international organizations and those containing new conventional rules on international crimes.

(c) Special Rapporteur's concluding remarks

174. The Special Rapporteur observed that draft article 7 had elicited a variety of views. He noted that it was a corollary of article 4, although he admitted that such connection could be more clearly spelled out in the commentary. The content of article 7 was meant to be tentative and expository. While it could be deleted, he pointed out that a major feature of the literature on the topic was the indication of categories of treaties in order to identify types of treaty which are in principle not susceptible to termination or suspension in the case of armed conflict.

175. While he noted that doubts had been expressed, he nonetheless felt that there seemed to be general support for the basic concept of article 7, namely that it was merely expository in character and that it was intended only to create a rebuttable presumption. He suggested that some of the categories were worth distinguishing as they enjoyed a firm base in State practice, for example, treaties creating a permanent regime, treaties of friendship, commerce and navigation, and multilateral law-making treaties.

9. Article 8. Mode of suspension or termination[53]

(a) Introduction by the Special Rapporteur

176. Article 8 was described as being fairly mechanical in its operation. A discussion of the possible outcome in terms of suspension or termination necessarily raised the question of the mode of suspension or termination. While not essential, it seemed useful to include the provision.

(b) Summary of the debate

177. It was suggested that the possibility of partial termination or suspension of treaties in particular situations also be envisaged in the draft article, since there existed no a priori requirement that a treaty be suspended or terminated as a whole. Such possibility would further serve to allow for the taking into account of the context within which the drafts articles were to be applied. It was also suggested that termination and suspension be distinguished. Further suggestions included considering the article together with draft article 13 (while clarifying the relationship between the two) and giving consideration to the possible inclusion of a provision analogous to that in article 57 of the Vienna Convention.

(c) Special Rapporteur's concluding remarks

178. The Special Rapporteur noted that the draft article had been relatively uncontroversial. He took note of the suggestion that the possibility of separability of provisions be given a clearer profile in the draft article, and observed that such a possibility had, in fact, been included by reference to article 44 of the Vienna Convention. He confirmed that the issue would be given greater prominence in the draft article.

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[53] Draft article 8 reads as follows:

Mode of suspension or termination

In case of an armed conflict the mode of suspension or termination shall be the same as in those forms of suspension or termination included in the provisions of articles 42 to 45 of the Vienna Convention on the Law of Treaties.

10. Article 9. The resumption of suspended treaties[54]

(a) Introduction by the Special Rapporteur

179. The Special Rapporteur explained that, like article 8, draft article 9 was mechanical in nature. Reference was made to international experience, including some Peace Treaties like the Italian Peace Treaty, where serious attempts were made to clarify the position where, as a result of a major armed conflict, there was a great residue of legal relations the survival of which was in question. In such circumstances, States had adopted practical methods of removing substantial ambiguities in their relationships.

(b) Summary of the debate

180. Support was expressed for the position that the resumption of suspended treaties should be favoured when the reasons for suspension no longer apply. Many members raised the same points in connection with draft article 9 as had been made in the context of article 4. For example, it was again suggested that a reference to the nature of the treaty be included in a new subparagraph 2 (c). Similarly, any changes to draft article 4 would imply consequential amendments to article 9. It was also suggested that a provision be included stipulating that, in cases of doubt as to whether a treaty is suspended or terminated as a result of an armed conflict, it would be presumed that it was only suspended, thereby leaving open the possibility for the parties to agree otherwise.

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[54] Draft article 9 reads as follows:

The resumption of suspended treaties

1. The operation of a treaty suspended as a consequence of an armed conflict shall be resumed provided that this is determined in accordance with the intention of the parties at the time the treaty was concluded.

2. The intention of the parties to a treaty, the operation of which has been suspended as a consequence of an armed conflict, concerning the susceptibility of the treaty to resumption of operation shall be determined in accordance:

(*a*) With the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

(*b*) With the nature and extent of the armed conflict in question.

(c) Special Rapporteur's concluding remarks

181. The Special Rapporteur noted that article 9 was ancillary to the purposes of article 4.

11. Article 10. Legality of the conduct of the parties[95]

(a) Introduction by the Special Rapporteur

182. The Special Rapporteur explained that, in draft article 10, he had taken a different approach from that of the Institute of International Law in its resolution of 1985 which provided several articles on the question of the legality of the conduct of the parties to an armed conflict. He observed that the difficulty was the absence of a determination of an illegality by an authoritative organ. In the present draft article that issue was largely set aside. He explained that the character of the draft articles would change if they were to consider such questions.

(b) Summary of the debate

183. Several members spoke in favour of including similar provisions to those in articles 7, 8 and 9[96] of the resolution of the Institute of International Law, distinguishing the rights of the State acting in individual or collective self-defence, or in compliance with a Security Council resolution adopted under Chapter VII of the Charter of the United Nations, from those of the State committing aggression. The view was expressed that it was necessary to consider the situation in which the parties to an armed conflict had profited from an illegal war, and that resort to the sole criterion of the intention of the parties could lead to a different conclusion.

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[95] Draft article 10 reads as follows:

Legality of the conduct of the parties

The incidence of the termination or suspension of a treaty shall not be affected by the legality of the conduct of the parties to the armed conflict according either to the principles of general international law or the provisions of the Charter of the United Nations.

[96] The texts of articles 7, 8 and 9 of the resolution of the Institute of International Law are reproduced in the first report of the Special Rapporteur, A/CN.4/552, para. 123.

Several members also expressed the view that the draft articles had to take into account developments since World War II, in particular as regards the prohibition of the use or threat of use of force, which constituted the cornerstone of the whole structure of the United Nations system for the maintenance of international peace and security. It was maintained that this could be done by focusing on what the effects would be of aggression or self-defence on treaties, without defining such acts. It was observed that only treaties incompatible with the exercise of the right to self-defence should be suspended or even repealed.

184. In terms of a further view, while the question of the legality of armed conflict was not pertinent in connection with the rules of armed conflict, the same could not be said with regard to the termination or suspension of other categories of treaties. It was accordingly not clear that the provision conformed to the Vienna Convention which singled out wrongdoing States for different treatment.

185. At the same time, opposition was expressed to the introduction of references to the inequality of belligerent parties in the draft articles. It was observed that, in practice, it was difficult to pass judgement on the parties to an armed conflict, and it was also noted that the matter was not without its complexity especially in the light of the existence of views, in the international community, that there were other forms of the lawful resort to the use of force, allegedly endorsed by customary international law.

(c) **Special Rapporteur's concluding remarks**

186. The Special Rapporteur acknowledged that the criticism of draft article 10 was justified and that the draft article needed to be redrafted accordingly. In his opinion, the matter could be resolved by means of resort to a proviso, cast in general terms, referring to the right to individual or collective self-defence. It could not be presumed that the States concerned could rely on such a proviso unless the legal conditions existed necessitating suspension or termination.

187. The Special Rapporteur stated that it was not his intention to examine the question of the validity or the voidability of treaties in terms of the Charter provisions relating to the use of force.

12. Article 11. Decisions of the Security Council;[87] Article 12. Status of third States as neutrals;[88] Article 13. Cases of termination or suspension;[89] and Article 14. The revival of terminated or suspended treaties[90]

(a) Introduction by the Special Rapporteur

193. The Special Rapporteur explained that while not strictly necessary, draft article 11 was useful in an expository draft. He further recalled the content of article 75 of the

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[87] Draft article 11 reads as follows:

Decisions of the Security Council

These articles are without prejudice to the legal effects of decisions of the Security Council in accordance with the provisions of Chapter VII of the Charter of the United Nations.

[88] Draft article 12 reads as follows:

Status of third States as neutrals

The present draft articles are without prejudice to the status of third States as neutrals in relation to an armed conflict.

[89] Draft article 13 reads as follows:

Cases of termination or suspension

The present draft articles are without prejudice to the termination or suspension of treaties as a consequence of:

(a) The agreement of the parties; or

(b) A material breach; or

(c) Supervening impossibility of performance; or

(d) A fundamental change of circumstances.

[90] Draft article 14 reads as follows:

The revival of terminated or suspended treaties

The present draft articles are without prejudice to the competence of parties to an armed conflict to regulate the question of the maintenance in force or revival of treaties, suspended or terminated as a result of the armed conflict, on the basis of agreement.

Vienna Convention. Draft article 12, likewise, contained a pure proviso, which, although also not strictly necessary, had a pragmatic purpose. With regard to draft article 13, the Special Rapporteur pointed to the fact that the subject matter of the report overlapped with other well-recognized aspects of the law of treaties, and that the provision took such overlap into account. The Special Rapporteur limited his introduction of draft article 14 to observing that there existed a substantial amount of practice on the revival of the status of pre-war treaties.

(b) Summary of the debate

189. General support existed for draft articles 11 to 14.

190. Support was expressed for the reiteration of the rules of the Vienna Convention in draft article 13. It was further suggested that treaties that might attract a defence of waiver or impossibility of performance in a situation of non-performance should be clearly distinguished for reasons of clarity and composition.

(c) Special Rapporteur's concluding remarks

191. The Special Rapporteur took note of the fact that draft articles 11, 12, 13 and 14 had not attracted any criticism. He also observed that while Article 11 was a necessary proviso, it could be incorporated into a more general proviso on the Charter of the United Nations.

CHAPTER VI

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

A. Introduction

192. At its fifty-second session (2000), the Commission decided to include the topic "Responsibility of international organizations" in its long-term programme of work.[60] The General Assembly, in paragraph 8 of its resolution 55/152 of 12 December 2000, took note of the Commission's decision with regard to the long-term programme of work, and of the syllabus for the new topic annexed to the Commission's 2000 report. The Assembly, in paragraph 8 of its resolution 56/82 of 12 December 2001, requested the Commission to begin its work on the topic "Responsibility of international organizations".

193. At its fifty-fourth session, the Commission decided, at its 2717th meeting, held on 9 May 2002, to include the topic in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur for the topic.[61] At the same session, the Commission established a Working Group on the topic. The Working Group in its report[62] briefly considered the scope of the topic, the relations between the new project and the draft articles on "Responsibility of States for internationally wrongful acts", questions of attribution, issues relating to the responsibility of member States for conduct that is attributed to an international organization, and questions relating to the content of international responsibility, implementation of responsibility and settlement of disputes. At the end of its fifty-fourth session, the Commission adopted the report of the Working Group.[63]

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[60] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729.

[61] Ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), paras. 461-463.

[62] Ibid., paras. 465-488.

[63] Ibid., para. 464.

194. At its fifty-fifth (2003) and fifty-sixth sessions (2004), the Commission had before it and considered the first and second reports of the Special Rapporteur.[45] The Commission provisionally adopted articles 1 to 7.[46]

B. Consideration of the topic at the present session

195. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/553).

196. Following the recommendations of the Commission,[47] the Secretariat had circulated the relevant chapters of the report of the Commission to international organizations asking for their comments and for any relevant materials which they could provide to the Commission. Comments from international organizations and from governments so far received were also before the Commission.[48]

197. The third report of the Special Rapporteur, like the previous two reports, reviewed the general pattern of the articles on Responsibility of States for internationally wrongful acts. It considered matters which were addressed in Chapters III and IV of Part One of those articles. Thus following the second report, which dealt with questions of attribution of conduct to international organizations, the third report dealt with the commission of a breach of an international obligation on the part of an international organization and with the responsibility of an international organization in connection with the act of a State or another international organization.

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[45] For the first report of the Special Rapporteur see A/CN.4/532. For the second report of the Special Rapporteur, see A/CN.4/541.

[46] Draft articles 1 to 3 were provisionally adopted at the fifty-fifth session (2003) and draft articles 4 to 7 were provisionally adopted at the fifty-sixth session (2004). For the text of draft articles 1 to 7 see section C below.

[47] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* and corrigendum (A/57/10 and Corr.1), paras. 464 and 465 and 466 and final. *Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 92.

[48] For comments from Governments and international organizations see A/CN.4/545, A/CN.4/547 and A/CN.4/556.

108 In his third report the Special Rapporteur proposed draft articles 8 to 10: article 8 "Existence of a breach of an international obligation",[68] article 9 "International obligation in force for an international organization",[70] article 10 "Extension in time of the breach of an international obligation",[71] article 11 "Breach consisting of a composite

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[68] Draft article 8 reads as follows:

"Existence of a breach of an international obligation

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.

2. The preceding paragraph also applies in principle to the breach of an obligation set by a rule of the organization."

[70] Draft article 9 reads as follows:

"International obligation in force for an international organization

An act of an international organization does not constitute a breach of an international obligation unless the international organization is bound by the obligation in question at the time the act occurs."

[71] Draft article 10 reads as follows:

"Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

act",[72] article 12 "Aid or assistance in the commission of an internationally wrongful act",[73] article 13 "Direction and control exercised over the commission of an internationally wrongful act",[74] article 14 "Coercion of a State or another international organization".[75]

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[72] Draft article 11 reads as follows:

Breach consisting of a composite act

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

[73] Draft article 12 reads as follows:

Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that organization.

[74] Draft article 13 reads as follows:

Direction and control exercised over the commission of an internationally wrongful act

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

(a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that organization.

[75] Draft article 14 reads as follows:

article 15 "Effects of the preceding articles",[76] and article 16 "Decisions, recommendations and authorizations addressed to member States and international organizations".[77]

Coercion of a State or another international organization

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

(a) The act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and

(b) The coercing international organization does so with knowledge of the circumstances of the act.

[76] Draft article 15 reads as follows:

Effect of the preceding articles

Articles 12 to 14 are without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

[77] Draft article 16 reads as follows:

Decisions, recommendations and authorizations addressed to member States and international organizations

1. An international organization incurs international responsibility if:

(a) It adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful if taken by the former organization directly; and

(b) The act in question is committed.

2. An international organization incurs international responsibility if it authorizes a member State or international organization to commit an act that would be internationally wrongful if taken by the former organization directly, or if it recommends such an act, provided that:

(a) The act fulfils an interest of the latter organization; and

(b) The act in question is committed.

3. The preceding paragraphs apply also when the member State or international organization does not act in breach of one of its international obligations and therefore does not incur international responsibility.

199. Draft articles 8 to 11 corresponded to articles 12 to 15 in chapter III of the articles on Responsibility of States for an internationally wrongful act which dealt with the existence of a breach of an international obligation, the requirement that the obligation be in force at the time the act occurs, the extension of the breach in time and the breach consisting of a composite act. In the view of the Special Rapporteur, those articles on Responsibility of States for internationally wrongful acts were of a general nature and reflected principles that were clearly applicable to the breach of an international obligation on the part of any subject of international law. Therefore there was no reason to take a different approach, in this context, with regard to international organizations. However, the Special Rapporteur considered it useful to add in draft article 8 a specific paragraph dealing with the breach of an obligation under the rules of the organization.

200. With regard to draft articles 12 to 16, the Special Rapporteur explained that they corresponded to articles 16 to 19 in chapter IV of the articles on Responsibility of States for internationally wrongful acts. The articles of that chapter consider cases and conditions under which a State is responsible for aid or assistance, or direction and control of another State in the commission of an internationally wrongful act, or else for the coercion of another State to commit a wrongful act. The Special Rapporteur explained that, even though there was little practice relating to the international responsibility of international organizations in this type of situations, there was no reason to think that the requirements and approach would be any different from those relating to Responsibility of States. He noted that there may be situations in which an international organization may be responsible for the conduct of its members. These cases do not seem to fall squarely into any of the categories covered by articles 16 to 18 on Responsibility of States for internationally wrongful acts. They involved compliance with acts of international organizations by their members. Such acts may be binding decisions or non-binding recommendations or authorizations. To cover these situations, he had proposed draft article 16.

201. The Commission considered the third report of the Special Rapporteur at its 2839th to 2843rd meetings, from 17 to 24 May 2005. At its 2843rd meeting, on 24 May 2005, the Commission established a Working Group to consider draft articles 8 and 16. The Commission considered the report of the Working Group, at its 2844th meeting, on 25 May 2005.

202. At its 2843rd meeting, 24 May 2005, the Commission referred draft articles 9 to 15 to the Drafting Committee. Draft articles 8 and 16 were referred to the Drafting Committee, at the 2844th meeting, on 25 May 2005, following the report of the Working Group.

203. The Commission considered and adopted the report of the Drafting Committee on draft articles 8 to 16 [15] at its 2848th meeting, on 3 June 2005 (see section C.1 below).

204. At its 2862nd and 2863rd meetings, on 2 and 3 August 2005, the Commission adopted the commentaries to the aforementioned draft articles (see section C.2 below).

C. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission

1. Text of the draft articles

205. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

CHAPTER I

Introduction

Article 1[79]

Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.

2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.

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[79] For the commentary to this article, see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 34-37.

Article 2[79]

Use of terms

For the purposes of the present draft articles, the term "international organization" refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.

Article 3[80]

General principles

1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(*a*) Is attributable to the international organization under international law; and

(*b*) Constitutes a breach of an international obligation of that international organization.

CHAPTER II[81]

Attribution of conduct to an international organization

Article 4[82]

General rule on attribution of conduct to an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.

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[79] Ibid., pp. 38-45.

[80] Ibid., pp. 45-49.

[81] For the commentary to this chapter, see ibid., *Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 100-103.

[82] For the commentary to this article, see ibid., pp. 104-109.

2. For the purposes of paragraph 1, the term "agent" includes officials and other persons or entities through whom the organization acts.[83]

3. Rules of the organization shall apply to the determination of the functions of its organs and agents.

4. For the purpose of the present draft article, "rules of the organization" means, in particular: the constituent instruments; decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization.[84]

Article 5[85]

Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

Article 6[86]

Excess of authority or contravention of instructions

The conduct of an organ or an agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes instructions.

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[83] The location of paragraph 2 may be reconsidered at a later stage with a view to eventually placing all definitions of terms in article 2.

[84] The location of paragraph 4 may be reconsidered at a later stage with a view to eventually placing all definitions of terms in article 2.

[85] For the commentary to this article, see *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 110-115.

[86] Ibid., pp. 116-120.

Article 7[87]

Conduct acknowledged and adopted by an international organization as its own

Conduct which is not attributable to an international organization under the preceding draft articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

CHAPTER III[88]

Breach of an international obligation

Article 8[89]

Existence of a breach of an international obligation

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.

2. Paragraph 1 also applies to the breach of an obligation under international law established by a rule of the international organization.

Article 9[90]

International obligation in force for an international organization

An act of an international organization does not constitute a breach of an international obligation unless the international organization is bound by the obligation in question at the time the act occurs.

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[87] Ibid., pp. 120-122.

[88] For the commentary to this chapter, see section C.2 below.

[89] For the commentary to this article, see ibid.

[90] Ibid.

Article 10[91]

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 11[92]

Breach consisting of a composite act

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

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[91] Ibid.

[92] Ibid.

CHAPTER IV[93]

Responsibility of an international organization in connection with the act of a State or another international organization

Article 12[94]

Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(*a*) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that organization.

Article 13[95]

Direction and control exercised over the commission of an internationally wrongful act

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

(*a*) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that organization.

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[93] For the commentary to this chapter, see section C.2 below.

[94] For the commentary to this article, see ibid.

[95] Ibid.

Article 14[96]

Coercion of a State or another international organization

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

(*a*) The act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and

(*b*) The coercing international organization does so with knowledge of the circumstances of the act.

Article 15 [16][97]

Decisions, recommendations and authorizations addressed to member States and international organizations

1. An international organization incurs international responsibility if it adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization.

2. An international organization incurs international responsibility if:

(*a*) It authorizes a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization, or recommends that a member State or international organization commit such an act; and

(*b*) That State or international organization commits the act in question in reliance on that authorization or recommendation.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member State or international organization to which the decision, authorization or recommendation is directed.

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[96] Ibid.

[97] Ibid. The square bracket refers to the corresponding article in the third report of the Special Rapporteur (A/CN.4/553).

Article 16 [15][98]

Effect of this chapter

This chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

2. Text of the draft articles with commentaries thereto adopted by the Commission at its fifty-seventh session

206. The text of the draft articles together with commentaries thereto provisionally adopted by the Commission at its fifty-seventh session is reproduced below.

CHAPTER III

Breach of an international obligation

(1) Draft articles 4 to 7 of the present draft address the question of attribution of conduct to an international organization. According to draft article 3, paragraph 2, attribution of conduct is one of the two conditions for an internationally wrongful act of an international organization to arise. The other condition is that the same conduct "constitutes a breach of an international obligation of that organization". This condition is examined in the present Chapter.

(2) As specified in draft article 3, paragraph 2, conduct of an international organization may consist of "an action or omission". An omission constitutes a breach when the international organization is under an international obligation to take some positive action and fails to do so. A breach may also consist in an action that is inconsistent with what the international organization is required to do, or not to do, under international law.

(3) To a large extent, the four articles included in the present Chapter correspond, in their substance and wording, to articles 12 to 15 on Responsibility of States for internationally wrongful acts.[99] Those articles express principles of a general nature that appear to be applicable to the

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[98] For the commentary to this article, see section C.2 below. The square bracket refers to the corresponding article in the third report of the Special Rapporteur (A/CN.4/553).

[99] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 46-47.

breach of an international obligation on the part of any subject of international law. There would thus be little reason to take a different approach in the present draft articles, although available practice relating to international organizations is limited with regard to the various issues addressed in the present Chapter.

Article 8

Existence of a breach of an international obligation

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.

2. Paragraph 1 also applies to the breach of an obligation under international law established by a rule of the international organization.

Commentary

(1) The wording of paragraph 1 corresponds to that of article 12 on Responsibility of States for internationally wrongful acts,[100] with the replacement of the term "State" with "international organization".

(2) As with regard to States, the term "international obligation" means an obligation under international law "regardless of its origin". As mentioned in the commentary to article 12 on Responsibility of States for internationally wrongful acts,[101] this is intended to convey that the "[i]nternational obligation may be established by a customary rule of international law, a treaty or a general principle applicable within the international legal order".

(3) An international obligation may be owed by an international organization to the international community as a whole, one or several States, whether members or non-members, another international organization or other international organizations and any other subject of international law.

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[100] Ibid., p. 124, with the related commentary, pp. 124-133.

[101] Ibid., para. (3) of the commentary to article 12, p. 126.

(4) For an international organization most obligations are likely to arise from the rules of the organization, which are defined in draft article 4, paragraph 4, of the present draft as meaning "in particular: the constituent instruments; decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization". While it may seem superfluous to state that obligations arising from the constituent instruments or binding acts that are based on those instruments are indeed international obligations, the practical importance of obligations under the rules of the organization makes it preferable to dispel any doubt that breaches of these obligations are also covered by the present draft. The wording in paragraph 2, which refers to an obligation "established by a rule of the international organization", is intended to refer to any obligation arising from the rules of the organization.

(5) The question may be raised whether all the obligations arising from rules of the organization are to be considered as international obligations. The legal nature of the rules of the organization is to some extent controversial. Many consider that the rules of treaty-based organizations are part of international law.[102] Some authors have held that, although international organizations are established by treaties or other instruments governed by international law, the internal law of the organization, once it has come into existence, does not form part of international law.[103] Another view, which finds support in practice,[104] is that international organizations that have achieved a high

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[102] The theory that the "rules of the organization" are part of international law has been expounded particularly by Matteo Decleva, *Il diritto interno delle Unioni internazionali* (Padova: Cedam, 1962) and G. Balladore Pallieri, "Le droit interne des organisations internationales", *Recueil des cours de l'Académie de droit international de La Haye*, vol. 127 (1969-II), p. 1. For a recent reassertion see Patrick Daillier and Alain Pellet, *Droit international public* (Nguyen Quoc Dinh), 7th ed. (Paris: L.G.D.J., 2002), pp. 576-577.

[103] Among the authors who defend this view: Lazar Focsaneanu, "Le droit interne de l'Organisation des Nations Unies", *Annuaire français de droit international*, vol. 3 (1957), p. 315, Philippe Cahier, "Le droit interne des organisations internationales", *Revue générale de droit international public*, vol. 67 (1963), p. 563, and Julio A. Barberis, "Nouvelles questions concernant la personnalité juridique internationale", *Recueil des cours de l'Académie de droit international de La Haye*, vol. 179 (1983-I), p. 145 at pp. 222-225. The distinction between international law and the internal law of international organizations was upheld also by Rudolf Bernhardt, "Qualifikation und Anwendungsbereich des internen Rechts internationaler Organisationen", *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 12 (1973), p. 7.

[104] As a model of this type of organization one could cite the European Community, for which the European Court of Justice gave the following description in *Costa v. E.N.E.L.*, in 1964:

degree of integration are a special case. A further view, which was shared by some members of the Commission, would draw a distinction according to the source and subject matter of the rules of the organization, and exclude, for instance, certain administrative regulations from the domain of international law.

(6) Although the question of the legal nature of the rules of the organization is far from theoretical for the purposes of the present draft, since it affects the applicability of the principles of international law with regard to responsibility for breaches of certain obligations arising from rules of the organization, paragraph 2 does not attempt to express a clear-cut view on the issue. It simply intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present draft apply.

(7) Rules of an organization may devise specific treatment of breaches of obligations, also with regard to the question of the existence of a breach. This does not need to be stated in article 8, because it could be adequately covered by a final provision of the draft, which would point to the possible existence of special rules on any of the matters covered by the draft. These special rules do not necessarily prevail over principles set out in the present draft.[105] For instance, with regard to the

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> "By contrast with ordinary treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."

Case 6/64, Judgment of 15 July 1964, *E.C.R. 1964*, p. 585 at pp. 1158-1159.

[105] The International Law Association (ILA) stated in this regard: "The characterization of an act of an international organization as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by the international organization's internal legal order." (*Report of the Seventy-First Conference*, Berlin, Final Report of the Committee on Accountability of International Organizations, Part Three, section one, adopted by resolution No. 1/2004). This paragraph appears to start from the assumption that the rules of the international organization in question are not part of international law.

existence of a breach of an international obligation, a special rule of the organization would not affect breaches of obligations that an international organization may owe to a non-member State. Nor would special rules affect obligations arising from a higher source, irrespective of the identity of the subject to whom the international organization owes the obligation.

(8) As explained in the commentary to article 12 on Responsibility of States for internationally wrongful acts,[106] the reference in paragraph 1 to the character of the obligation concerns the "various classifications of international obligations".

(9) Obligations existing for an international organization may relate in a variety of ways to conduct of its member States or international organizations. For instance, an international organization may have acquired an obligation to prevent its member States from taking a certain conduct. In this case, the conduct of member States would not per se cause a breach of the obligation. The breach would consist in the failure, on the part of the international organization, to comply with its obligation of prevention. Another possible combination of the conduct of an international organization with that of its member States occurs when the organization is under an obligation to achieve a certain result, irrespective of whether the necessary conduct will be taken by the organization itself or by one or more of its member States. This combination was acknowledged by the European Court of Justice in a case, *Parliament v. Council*, concerning a treaty establishing cooperation that was concluded by the European Community and its member States, on the one side, and several non-member States, on the other side. The Court found that:

> "In those circumstances, in the absence of derogations expressly laid down in the Convention, the Community and its Member States as partners of the ACP States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance."[107]

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[106] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. (11) of the commentary to article 12, p. 170.

[107] Case C-316/91. Judgment of 2 March 1994, *E.C.R. 1994-I*, p. 625 at pp. 660-661.

Article 9

International obligation in force for an international organization

An act of an international organization does not constitute a breach of an international obligation unless the international organization is bound by the obligation in question at the time the act occurs.

Commentary

Given the fact that no specific issue appears to affect the application to international organizations of the principle expressed in article 13 on Responsibility of States for internationally wrongful acts,[108] the term "State" is simply replaced by "international organization" in the title and text of draft article 9.

Article 10

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

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[108] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 133, with the related commentary, at pp. 133-138. A paragraph adopted by the ILA (supra, note 105) is similarly worded: "An act of an international organization does not constitute a breach of an international obligation unless the organization is bound by the obligation in question at the time the act occurs."

Commentary

Similar considerations to those made in the commentary to draft article 9 apply in the case of draft article 10. The text corresponds to that of article 14 on Responsibility of States for internationally wrongful acts,[109] with the replacement of the term "State" with "international organization".

Article 11

Breach consisting of a composite act

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Commentary

(1) The observation made in the commentary to draft article 9 also applies with regard to draft article 11. This corresponds to article 15 on Responsibility of States for internationally wrongful acts,[110] with the replacement of the term "State" with "international organization" in paragraph 1.

CHAPTER IV

Responsibility of an international organization in connection with the act of a State or another international organization

(1) Articles 16 to 18 on responsibility of States for internationally wrongful acts[111] consider the cases in which a State assists or aids, directs and controls, or coerces another State in the

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[109] Ibid., p. 138, with the related commentary, at pp. 138-145.

[110] Ibid., p. 146, with the related commentary, at pp. 146-150.

[111] Ibid., p. 47.

commission of an internationally wrongful act. Parallel situations could be envisaged with regard to international organizations. For instance, an international organization may aid or assist a State or another international organization in the commission of an internationally wrongful act. For the purposes of international responsibility, there would be no reason for distinguishing the case of an international organization aiding or assisting a State or another international organization from that of a State aiding or assisting another State. Thus, even if available practice with regard to international organizations is limited, there is some justification for including in the present draft provisions that are parallel to articles 16 to 18 on Responsibility of States for internationally wrongful acts.

(2) The pertinent provisions on Responsibility of States for internationally wrongful acts are based on the premise that aid or assistance, direction and control, and coercion do not affect attribution of conduct to the State which is aided or assisted, under the direction or control, or under coercion. It is that State which commits an internationally wrongful act, although in the case of coercion wrongfulness could be excluded, while the other State is held responsible not for having actually committed the wrongful act but for its causal contribution to the commission of the act.

(3) Relations existing between an international organization and its member States or international organizations allow the former organization to influence the conduct of members also in cases that are not envisaged in articles 16 to 18 on Responsibility of States for internationally wrongful acts. Some international organizations have the power to take decisions binding their members, while most organizations may only influence their members' conduct through non-binding acts. The consequences that this type of relation, which does not have a parallel in the relations between States, may entail with regard to an international organization's responsibility will also be examined in the present Chapter.

(4) The question of an international organization's international responsibility in connection with the act of a State has been discussed in several cases before international tribunals or other bodies, but has not been examined by those tribunals or bodies because of lack of jurisdiction *ratione personae*. Reference should be made in particular to the following

cases: *M. & Co. v. Germany*[112] before the European Commission of Human Rights; *Cantoni v. France*,[113] *Matthews v. United Kingdom*[114] and *Senator Lines v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*[115] before the European Court of Human Rights; and *H.v.d.P. v. Netherlands*[116] before the Human Rights Committee. In the latter case, a communication concerning the conduct of the European Patent Office was held to be inadmissible, because that conduct could not,

> "in any way, be construed as coming within the jurisdiction of the Netherlands or of any other State party to the International Covenant on Civil and Political Rights and the Optional Protocol thereto."[117]

(5) Several cases concern the relations between the European Community and its member States. In *M. & Co. v. Germany* the European Commission of Human Rights held:

> "The Commission first recalls that it is in fact not competent *ratione materiae* to examine proceedings before or decisions of organs of the European Communities [...] This does not mean, however, that by granting executory power to a judgment of the European Court of Justice the competent German authorities acted quasi as Community organs and are to that extent beyond the scope of control exercised by the conventional organs."[118]

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[112] Decision of 9 February 1990, Application No. 13258/87, *Decisions and Reports*, vol. 64, p. 138.

[113] Judgment of 15 November 1996, ECHR 1996-V, p. 1614.

[114] Judgment of 18 February 1999, ECHR 1999-I, p. 251.

[115] Decision of 10 March 2004, unpublished.

[116] Decision of 8 April 1987, Communication No. 217/1986, *Official Records of the General Assembly, Forty-second Session, Supplement No. 40* (A/42/40), p. 185.

[117] Ibid., p. 186 (para. 3.2).

[118] Supra, note 112.

(6) A different view was recently endorsed in *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* by a World Trade Organization (WTO) panel, which:

> "accepted the European Communities' explanation of what amounts to its sui generis domestic constitutional arrangements that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its member States which, in such a situation, 'act de facto as organs of the Community, for which the Community would be responsible under WTO law and international law in general'."[119]

This approach implies making an exception for the relations between the European Community and its member States, to the effect that, in the presence of a European Community act binding a member State, State authorities would be considered as acting as organs of the Community.

(7) The issue was recently before the European Court of Human Rights in *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*. The Court said in its decision on admissibility in this case that it would examine at a later stage of the proceedings:

> "whether the impugned acts can be considered to fall within the jurisdiction of the Irish State within the meaning of article 1 of the Convention, when that State claims that it was obliged to act in furtherance of a directly effective and obligatory EC Regulation."[120]

In its unanimous judgement on the merits of 30 June 2005 the Grand Chamber of the Court held:

> "In the present case it is not disputed that the act about which the applicant complained, the detention of the aircraft leased by it for a period of time, was implemented by the authorities of the respondent State on its territory following a decision to impound of the

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[119] Decision of 15 March 2005, WTO Panel Report, European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs - Complaint by the United States ("EC - Trademarks and Geographical Indications (US)"), WT/DS174/R, adopted 20 April 2005, para. 7.725.

[120] Decision of 13 September 2001, unpublished, at para. A.

Irish Minister for Transport. In such circumstances the applicant company, as the addressee of the impugned act fell within the 'jurisdiction' of the Irish State, with the consequence that its complaint about that act is compatible *ratione loci*, *personae* and *materiae* with the provision of the Convention."[121]

For the purposes of the present Chapter, it seems preferable at the current stage of judicial developments not to assume that a special rule has come into existence to the effect that, when implementing a binding act of the European Community, State authorities would act as organs of the European Community.

Article 12

Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(*a*) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that organization.

Commentary

The application to an international organization of a provision corresponding to article 16 on Responsibility of States for internationally wrongful acts[122] is not problematic.[123]

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[121] Unpublished decision at para. 137.

[122] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 155, with the related commentary, at pp. 155-160.

[123] The ILA Berlin resolution (supra, note 105) stated: "There is also an internationally wrongful act of an international organization when it aids or assists a State or another international organization in the commission of an internationally wrongful act by that State or other international organization." This text does not refer to the conditions listed in article 12 under (a) and (b).

Draft article 12 only introduces a few changes: the reference to the case in which a State aids or assists another State has been modified in order to refer to an international organization aiding or assisting a State or another international organization; in consequence, certain changes have been made in the rest of the text.

Article 13

Direction and control exercised over the commission of an internationally wrongful act

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

(*a*) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that organization.

Commentary

(1) The text of draft article 13 corresponds to article 17 on Responsibility of States for internationally wrongful acts,[124] with changes similar to those explained in the commentary to draft article 12. Thus, the reference to the directing and controlling State has been replaced by that to an international organization which directs and controls; moreover, the term "State" has been replaced with "State or another international organization" in the reference to the entity which is directed and controlled.

(2) If one assumes that the Kosovo Force [KFOR] is an international organization, an example of two international organizations allegedly exercising direction and control in the commission of a wrongful act may be taken from the French Government's preliminary objections in *Legality of Use of Force (Yugoslavia v. France)* before the International Court of Justice, when the French Government held that:

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[124] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 160, with the related commentary (pp. 160-165).

"NATO is responsible for the 'direction' of KFOR and the United Nations for 'control' of it."[125]

A joint exercise of direction and control was probably envisaged.

(3) In the relations between an international organization and its member States and international organizations the concept of "direction and control" could conceivably be extended so as to encompass cases in which an international organization takes a decision binding its members. The commentary to article 17 on Responsibility of States for internationally wrongful acts explains that "Article 17 is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State",[126] that "the term 'controls' refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern",[127] and that "the word 'directs' does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind".[128] If one interprets the provision in the light of the passages quoted above, the adoption of a binding decision on the part of an international organization could determine, under certain circumstances, a form of direction or control in the commission of an internationally wrongful act. The assumption is that the State or international organization which is the addressee of the decision is not given discretion to take conduct that, while complying with the decision, would not constitute an internationally wrongful act.

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[125] Preliminary Objections, p. 33, para. 45. A similar view with regard to the relations between NATO and KFOR was held by Alain Pellet, "L'imputabilité d'éventuels actes illicites. Responsabilité de l'OTAN ou des Etats membres", in Christian Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment* (The Hague: Kluwer Law International, 2002), p. 193, at p. 199.

[126] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. (6) of the commentary to article 17, p. 163.

[127] Ibid., para. (7) of the commentary to article 17, p. 164.

[128] Ibid.

(4) If the adoption of a binding decision were to be regarded as a form of direction and control within the purview of draft article 13, this provision would overlap with draft article 15 of the present draft. The overlap would only be partial: it is sufficient to point out that draft article 15 also covers the case that a binding decision requires a member State or international organization to take an act which is not unlawful for that State or international organization. In any case, the possible overlap between draft articles 13 and 15 would not create any inconsistency, since both provisions assert, albeit under different conditions, the international responsibility of the international organization which has taken a decision binding its member States or international organizations.

Article 14

Coercion of a State or another international organization

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

(*a*) The act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and

(*b*) The coercing international organization does so with knowledge of the circumstances of the act.

Commentary

(1) The text of draft article 14 corresponds to article 18 on Responsibility of States for internationally wrongful acts,[129] with changes similar to those explained in the commentary to draft article 12. The reference to a coercing State has been replaced with that to an international organization; moreover, the coerced entity is not necessarily a State, but could also be an international organization. Also the title has been modified from "Coercion of another State" to "Coercion of a State or another international organization".

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[129] Ibid., p. 165, with the related commentary, at pp. 165-168.

(2) In the relations between an international organization and its member States or international organizations, a binding decision by an international organization could give rise to coercion only under exceptional circumstances. The commentary to article 18 on Responsibility of States for internationally wrongful acts stresses that:

> "Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State."[130]

(3) Should nevertheless an international organization be considered as coercing a member State or international organization when it adopts a binding decision, there could be an overlap between draft article 14 and draft article 15. The overlap would only be partial, given the different conditions set by the two provisions, and especially the fact that according to draft article 15 the act committed by the member State or international organization need not be unlawful for that State or that organization. To the extent that there would be an overlap, an international organization could be regarded as responsible under either draft article 14 or draft article 15. This would not give rise to any inconsistency.

Article 15

Decisions, recommendations and authorizations addressed to member States and international organizations

1. An international organization incurs international responsibility if it adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization.

2. An international organization incurs international responsibility if:

(*a*) It authorizes a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization, or recommends that a member State or international organization commit such an act; and

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[130] Ibid., para. (2) of the commentary to draft article 18, p. 166.

(*b*) That State or international organization commits the act in question in reliance on the authorization or recommendation.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member State or international organization to which the decision, authorization or recommendation is directed.

Commentary

(1) The fact that an international organization is a subject of international law, which is distinct from the organization's members, opens up the possibility for the organization to try to influence its members in order to achieve through them a result that the organization could not lawfully achieve directly, and it would circumvent one of its international obligations. As was noted by the delegation of Austria during the debates in the Sixth Committee:

> "[...] an international organization should not be allowed to escape responsibility by 'outsourcing' its actors."[131]

(2) The Legal Counsel of WIPO considered the case of an international organization requiring a member State to commit an internationally unlawful act, and wrote:

> "[...] in the event a certain conduct, which a member State takes in compliance with a request on the part of an international organization, appears to be in breach of an international obligation both of that State and of that organization, then the organization should also be regarded as responsible under international law."[132]

(3) The opportunity for circumvention is likely to be higher when the conduct of the member State or international organization would not be in breach of an international obligation, for instance because the circumventing international organization is bound by a treaty with a non-member State and the same treaty does not produce effects for the organization's members.

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[131] A/C.6/59/SR.22, para. 24.

[132] A/CN.4/556, p. 46.

(4) The existence on the part of the international organization of a specific intention of circumventing is not required. Thus, when an international organization requests its members to take a certain conduct and this would imply the circumvention of one of the organization's international obligations, that organization could not avoid its responsibility by showing the absence of any intention to circumvent its obligation.

(5) In the case of a binding decision paragraph 1 does not stipulate as a pre-condition, for international responsibility of an international organization to arise, that the required act be committed by member States or international organizations. Since compliance by members with a binding decision is to be expected, the likelihood of a third party being injured would then be high. It appears therefore preferable to hold the organization already responsible and thus allow the third party that would be injured to seek a remedy even before the act is committed. Moreover, if the threshold of international responsibility is advanced, the international organization would have to refrain from placing its members in the uncomfortable position of either infringing their obligations under the decision or causing the international responsibility of the international organization, as well as possibly incurring their own responsibility.

(6) A member State or international organization may be given discretion with regard to implementation of a binding decision adopted by an international organization. In its judgment on the merits in *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, the European Court of Human Rights considered conduct that member States of the European Community take when implementing binding EC acts and observed:

> "[...] (A) State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations [...] [N]umerous Convention cases [...] confirm this. Each case (in particular, the *Cantoni* judgment, at para. 26) concerned a review by this Court of the exercise of State discretion for which EC law provided."[133]

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[133] Supra, note 121, at para. 157.

(7) Paragraph 1 assumes that compliance with the binding decision of the international organization necessarily entails circumvention of one of its international obligations. As was noted in a statement in the Sixth Committee by the delegation of Denmark on behalf of the five Nordic countries:

> "[...] it appeared essential to find the point where the member State could be said to have so little 'room for manoeuvre' that it would seem unreasonable to make it solely responsible for certain conduct."[134]

Should on the contrary the decision allow the member State or international organization some discretion to take an alternative course which does not imply circumvention, responsibility would arise for the international organization that has taken the decision only if circumvention actually occurs, as stated in paragraph 2.

(8) Paragraph 2 considers the case in which an international organization circumvents one of its international obligations by recommending to a member State or international organization the commission of a certain act or by authorizing a member State or international organization to commit such an act. The effects of recommendations and authorizations may differ, especially according to the organization concerned. The reference to these two types of acts is intended to cover all non-binding acts of an international organization that are susceptible of influencing the conduct of member States or international organizations.

(9) For international responsibility to arise, the first condition in paragraph 2 is that the international organization authorizes an act that would be wrongful for that organization and moreover would allow it to circumvent one of its international obligations. Since the recommendation or authorization in question is not binding, and may not prompt any conduct which conforms to the recommendation or authorization, a further condition laid out in paragraph 2 is that, as specified under (a), the act which is recommended or authorized is actually committed.

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[134] A/C.6/59/SR.22, para. 66.

(10) Moreover, as specified under (b), the act in question has to be committed "in reliance on that authorization or recommendation". This condition implies a contextual analysis of the role that the recommendation or authorization actually plays in determining the conduct of the member State or international organization.

(11) Reliance on the recommendation or authorization should not be unreasonable. Responsibility of the recommending or authorizing international organization cannot arise if, for instance, the recommendation is outdated and not intended to apply to the current circumstances, because of the substantial changes that have intervened since the adoption.

(12) While the authorizing or recommending international organization would be responsible if it requested the commission of an act that would represent a circumvention of one of its obligations, that organization would clearly not be responsible for any other breach that the member State or international organization to which the authorization or recommendation is addressed might commit. To that extent, the following statement contained in a letter addressed on 11 November 1996 by the United Nations Secretary-General to the Prime Minister of Rwanda appears accurate:

> "[...] insofar as 'Opération Turquoise' is concerned, although that operation was 'authorized' by the Security Council, the operation itself was under national command and control and was not a United Nations operation. The United Nations is, therefore, not internationally responsible for acts and omissions that might be attributable to 'Opération Turquoise'."[135]

(13) Paragraph 3 makes it clear that, unlike draft articles 12 to 14, draft article 15 does not base the international responsibility of the international organization that takes a binding decision, or authorizes or recommends, on the unlawfulness of the conduct of the member State or international organization to which the decision, authorization or recommendation is addressed. As was noted in the commentaries to draft articles 13 and 14, when the conduct is unlawful and other conditions are fulfilled, there is the possibility of an overlap between the

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[135] Unpublished letter. "Opération Turquoise" was established by Security Council resolution S/RES/929 (1994).

cases covered in those provisions and those to which draft article 15 applies. However, the consequence would only be the existence of alternative bases for holding an international organization responsible.

Article 16

Effect of this Chapter

This Chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

Commentary

Draft article 16 is a "without prejudice" clause relating to the whole Chapter. It corresponds in part to article 19 on Responsibility of States for internationally wrongful acts.[136] The latter provision intends to leave unprejudiced "the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State". References to international organizations have been added in draft article 16. Moreover, since the international responsibility of States committing a wrongful act is covered by the articles on Responsibility of States for internationally wrongful acts and not by the present draft, the wording of the clause has been made more general.

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[136] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 168, with the related commentary (pp. 168-169).

CHAPTER VII

DIPLOMATIC PROTECTION

A. Introduction

207. At its forty-eighth session (1996), the Commission identified "Diplomatic protection" as one of three topics appropriate for codification and progressive development.[137] In the same year, the General Assembly, in its resolution 51/160 of 16 December 1996, invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session (1997), the Commission, pursuant to General Assembly resolution 51/160, established at its 2477th meeting a Working Group on the topic.[138] The Working Group submitted a report at the same session, which was endorsed by the Commission.[139] The Working Group attempted to (a) clarify the scope of the topic to the extent possible and (b) identify issues that should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic, which the Commission recommended be used as the basis for the submission of a preliminary report by the Special Rapporteur.[140]

208. At its 2501st meeting, on 11 July 1997, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.

209. The General Assembly, in paragraph 8 of its resolution 52/156, endorsed the decision of the Commission to include in its agenda the topic "Diplomatic protection".

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[137] See ibid., *Fifty-first Session, Supplement No. 10* (A/51/10), para. 249 and annex II, addendum 1.

[138] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), chap. VIII.

[139] Ibid., para. 171.

[140] Ibid., paras. 189-190.

210. At its fiftieth session (1998), the Commission had before it the preliminary report of the Special Rapporteur.[141] At the same session, the Commission established an open-ended Working Group to consider possible conclusions that might be drawn on the basis of the discussion on the approach to the topic.[142]

211. At its fifty-first session (1999), the Commission appointed Mr. Christopher J.R. Dugard Special Rapporteur for the topic,[143] after Mr. Bennouna was elected a judge of the International Criminal Tribunal for the Former Yugoslavia.

212. At its fifty-second session (2000), the Commission had before it the Special Rapporteur's first report (A/CN.4/506 and Corr.1 and Add.1) containing draft articles 1 to 9. The Commission deferred its consideration of A/CN.4/506/Add.1 to the next session, due to the lack of time. At the same session, the Commission established an open-ended informal consultation, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.[144] The Commission subsequently decided, at its 2635th meeting, to refer draft articles 1, 3 and 5 to 8 to the Drafting Committee together with the report of the informal consultation.

213. At its fifty-third session (2001), the Commission had before it the remainder of the Special Rapporteur's first report (A/CN.4/506/Add.1) on draft article 9, as well as his second report (A/CN.4/514 and Corr.1). Due to the lack of time, the Commission was only able to consider those parts of the second report covering draft articles 10 and 11, and deferred consideration of the remainder of document A/CN.4/514, concerning draft articles 12 and 13, to the next session. The Commission decided at its 2688th meeting, on 12 July 2001, to refer draft article 9 to the Drafting Committee, and decided at its 2690th meeting, on 17 July 2001, to refer draft articles 10 and 11 to the Drafting Committee.

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[141] A/CN.4/484.

[142] The conclusions of the Working Group are contained in *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 108.

[143] Ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), para. 19.

[144] The report of the informal consultations is contained in ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 495.

214. At its 2688th meeting, the Commission established an open-ended informal consultation on article 9, chaired by the Special Rapporteur.

215. At its fifty-fourth session (2002), the Commission had before it the remainder of the second report of the Special Rapporteur (A/CN.4/514 and Corr.1), concerning draft articles 12 and 13, as well as his third report (A/CN.4/523 and Add.1), covering draft articles 14 to 16. The Commission decided, at its 2719th meeting, on 14 May 2002, to refer draft article 14, paragraphs (a), (b), (d) (to be considered in connection with paragraph (a)), and (e), to the Drafting Committee. It further decided, at its 2729th meeting, on 4 June 2002, to refer draft article 14, paragraph (c), to the Drafting Committee, to be considered in connection with paragraph (a).

216. The Commission considered the report of the Drafting Committee on draft articles 1 to 7 [8], at its 2730th to 2732nd meetings, from 5 to 7 June 2002. It adopted articles 1 to 3 [5] at its 2730th meeting, articles 4 [9], 5 [7] and 7 [8] at its 2731st meeting, and article 6 at its 2732nd meeting. At its 2745th and 2746th meetings, on 12 and 13 August 2002, the Commission adopted the commentaries to the aforementioned draft articles.

217. At its 2740th meeting, on 2 August 2002, the Commission established an open-ended informal consultation, chaired by the Special Rapporteur, on the question of the diplomatic protection of crews as well as that of corporations and shareholders.

218. At its fifty-fifth session (2003), the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/530 and Add.1). The Commission considered the first part of the report, concerning draft articles 17 to 20, at its 2757th to 2762nd, 2764th and 2768th meetings, from 14 to 23 May and on 28 May and 5 June 2003, respectively. It subsequently considered the second part of the report, concerning draft articles 21 and 22, at its 2775th to 2777th meetings, on 15, 16 and 18 July 2003.

219. At its 2762nd meeting, on 23 May 2003, the Commission decided to establish an open-ended Working Group, chaired by the Special Rapporteur, on article 17, paragraph 2.[145]

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[145] See ibid., *Fifty-eighth Session, Supplement No. 10* (A/58/10), paras. 90-92.

The Commission considered the report of the Working Group at its 2764th meeting, on 28 May 2003.

220. The Commission decided, at its 2764th meeting, to refer article 17, as proposed by the Working Group,[146] and articles 18, 19 and 20 to the Drafting Committee. It subsequently further decided, at its 2777th meeting, to refer articles 21 and 22 to the Drafting Committee.

221. The Commission considered the report of the Drafting Committee on draft articles 8 [10], 9 [11] and 10 [14] at its 2768th meeting, on 5 June 2003. It provisionally adopted draft articles 8 [10], 9 [11] and 10 [14] at the same meeting.

222. At its fifty-sixth session (2004), the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/538). The Commission considered the report at its 2791st to 2796th meetings, from 3 to 11 May 2004. In response to a request from the Commission, the Special Rapporteur prepared a memorandum[147] on the relevance of the clean hands doctrine to the topic. Owing to a lack of time, the Commission deferred consideration of the memorandum to the following session.

223. At its 2794th meeting, on 6 May 2004, the Commission decided to refer draft article 26, together with the alternative formulation for draft article 21 as proposed by the Special Rapporteur, to the Drafting Committee. The Commission further decided, at its 2796th meeting, on 11 May 2004, that the Drafting Committee should consider elaborating a provision on the connection between the protection of ships' crews and diplomatic protection.

224. At its fifty-sixth session (2004), the Commission adopted on first reading a set of 19 draft articles together with commentaries on diplomatic protection.[148] At the same meeting, the Commission decided, in accordance with articles 16 and 21 of its statute, to transmit the draft

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[146] Ibid., para. 92.

[147] Document ILC (LV1)/DP/CRP.1, subsequently issued as the sixth report of the Special Rapporteur in document A/CN.4/546.

[148] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 59.

articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006.

B. Consideration of the topic at the present session

225. At the present session, the Commission had before it the sixth report of the Special Rapporteur (A/CN.4/546). The Commission considered the report at its 2844th to 2846th meetings, from 25 to 31 May 2005.

1. Clean hands doctrine

(a) Introduction by the Special Rapporteur

226. The Special Rapporteur noted that while the importance of the clean hands doctrine in international law could not be denied, the question before the Commission was whether it was sufficiently closely linked to the topic of diplomatic protection to warrant its inclusion in the draft articles on the topic. His conclusion was that it did not obviously belong to the field of diplomatic protection and that it should therefore not be included in the draft articles.

227. He observed that it had been argued in previous sessions of the Commission that the clean hands doctrine should be included in the draft articles because it was invoked in the context of diplomatic protection in order to preclude a State from exercising diplomatic protection if the national it was seeking to protect had suffered injury as a result of his or her own wrongful conduct. Three arguments had been made in support of that position.

228. First, it was contended that the doctrine did not belong to the realm of inter-State disputes, i.e., those involving direct injury by one State to another rather than injury to a national. In response, the Special Rapporteur provided a brief survey of the jurisprudence of the International Court of Justice[149] to illustrate the fact that, while the Court had never asserted that

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[149] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, at paras. 63-64, reproduced in document A/ES-10/273 and Corr.1; *Case concerning Oil Platforms*, Judgment, *I.C.J. Reports*, 2003, p. 161 at pp. 176-178, paras. 27-30; *La Grand (Germany v. United States of America)*, Judgment, *I.C.J. Reports*, 2001, p. 466 at pp. 488-489, paras. 61-63; *Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment, *I.C.J. Reports*, 2004, p. 12 at p. 38,

the doctrine belonged to the realm of a State claim either for direct or for indirect injury, the clean hands doctrine had most frequently been raised in the context of inter-State claims for direct injury to a State. In no case had the Court relied on or upheld the doctrine. It had, instead, always found the doctrine inapplicable. Likewise, in no case had it stated or suggested that the argument was inapplicable in inter-State claims and that it applied only to cases of diplomatic protection.

229. Second, it was suggested that if the individual seeking diplomatic protection had himself violated the domestic law of the respondent State or international law, then the State of nationality could not protect him. In response, the Special Rapporteur observed that once a State took up a claim of its national in relation to a violation of international law, the claim became that of the State, in accordance with the Vattelian fiction recognized in the *Mavrommatis Palestine Concessions* case,[150] and the misconduct of the national ceased to be relevant; only the misconduct of the plaintiff State itself might become relevant. He cited the examples of the *La Grand* and *Avena* cases, where the foreign nationals had committed atrocious crimes but their misconduct had not been raised by the respondent State to defend itself against the charges of failure to grant them consular access. In addition, the State of nationality would seldom protect one of its nationals who had behaved improperly or illegally in a foreign State, because in most circumstances no internationally wrongful act would have been committed.

230. Third, it was contended that the clean hands doctrine had been applied in cases involving diplomatic protection. In response, the Special Rapporteur noted that relatively few cases could be cited in favour of the applicability of the clean hands doctrine in the context of diplomatic protection, and that, upon analysis, those that were cited did not support the case for its

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paras. 45-47; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, *I.C.J. Reports*, 1997, p. 7 at p. 76, para. 133; *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, *I.C.J. Reports*, 2002, p. 137, para. 35 (dissenting opinion of Judge ad hoc Van den Wyngaert); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, *I.C.J. Reports*, 1986, p. 259 at pp. 392-394, paras. 268-272 (dissenting opinion of Judge Schwebel). See A/CN.4/546, para. 5.

[150] *P.C.I.J. Reports*, 1925, Series A, No. 5, at p. 12.

inclusion.[151] He noted further that while some writers nevertheless maintained that the clean hands doctrine belonged in the context of diplomatic protection, they offered no authority to support their views; and many other writers were highly sceptical about the doctrine. In addition, during the debate in the Sixth Committee of the General Assembly at its fifty-ninth session, most delegations had made no comment on the clean hands doctrine, and those that had commented had agreed that the clean hands doctrine should not be included in the draft articles on diplomatic protection.

(b) Summary of the debate

231. General support was expressed for the Special Rapporteur's conclusion that the clean hands doctrine should not be included in the draft articles. The doctrine had been raised primarily in the context of claims for direct State injury, which was beyond the scope of diplomatic protection,[152] and the few cases falling within the scope of diplomatic protection did not constitute sufficient practice to warrant codification. Nor could its inclusion be justified as an exercise in the progressive development of international law. Furthermore, support was expressed for the Special Rapporteur's suggestion in his report[153] that it was more appropriate for the doctrine to be invoked at the stage of the examination of the merits since it related to the attenuation or exoneration of responsibility rather than admissibility; and it was suggested that such a possibility could be expressly recognized in the draft articles. Another suggestion was to insert a proviso stating that the draft articles were without prejudice to the application of general international law to questions of admissibility.

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[151] See *Ben Tillett (Great Britain v. Belgium)*, in *Revue générale de droit international public*, vol. 6, No. 46 (1899), and the *Virginius (United States of America v. Spain)* in John Bassett Moore, *A Digest of International Law* (Washington: G.P.O., 1906), vol. 2, p. 895. See A/CN.4/546, paras. 12-13.

[152] See draft articles on diplomatic protection adopted by the Commission on first reading, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 59, arts. 1 and 15.

[153] See A/CN.4/546, para. 16.

232. Others were of the view that the Special Rapporteur had gone too far in suggesting that the clean hands doctrine could lead to exoneration of responsibility at the stage of the merits, and preferred that it be limited to attenuation. It was pointed out that the application of the doctrine, or that of good faith, could yield different results in different situations, and would not necessarily deny the complaining party the right to seek in every single instance a suitable remedy, even if its own wrongful conduct had elicited the wrongful response. Reference was also made to article 39 on Responsibility of States for internationally wrongful acts.[154]

233. Notwithstanding their support for the Special Rapporteur's conclusions, some members took issue with the Special Rapporteur's reasoning. For example, the Commission was cautioned against stretching the *Mavrommatis*[155] principle that an injury to a national is an injury to the State itself too far: it would not be incongruous to consider that the "clean hands" of the individual could constitute a precondition for diplomatic protection, exactly as the exhaustion of local remedies was up to the private individual and not the State.

234. In addition, some members maintained that in referring to the consular notification cases (*La Grand* and *Avena*),[156] by way of illustrating the point that the "unclean" hands of the individuals concerned played no role in diplomatic protection, the Special Rapporteur was employing too vague a conception of the clean hands doctrine because he failed to examine the relationship between the unlawful act of the individual and the internationally wrongful act of the State. The question was whether the individual who benefited from diplomatic protection was himself or herself responsible for the breach of the rule of international law that the host State was accused of violating.

235. In another view, the lack of practice did not necessarily preclude the adoption of some version of the doctrine by way of progressive development of the law. The key difficulty involved the proper identification of the doctrine, as there existed at least the two following different legal positions described by the same phrase: (a) where the illegality

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[154] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 76.

[155] *Mavrommatis Palestine Concession, P.C.I.J. Reports*, 1924, Series A, No. 2, p. 12 at para. 8.

[156] See supra, note 149, and A/CN.5/546, para. 9.

alleged would, in principle, form part of the merits and (b) where it is invoked ex parte by a respondent State simply by way of prejudice as a principle of international public policy constituting a bar to the admissibility of the claim. Each case called for contextual analysis and careful characterization.

(c) Special Rapporteur's concluding remarks

236. The Special Rapporteur observed that the clean hands doctrine was an important principle of international law that had to be taken into account whenever there was evidence that an applicant State had not acted in good faith and that it had come to court with unclean hands. It was to be distinguished from the *tu quoque* argument, which allowed a respondent State to assert that the applicant State had also violated a rule of international law, and was instead to be confined to cases in which the applicant State had acted improperly in bringing a case to court. He further acknowledged the various criticisms that had been raised as to his treatment of the doctrine in his report, and observed that some members had rightly noted that the report omitted a consideration of the doctrine in the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)* case.[157]

2. Other issues

(a) Summary of the debate

237. As regards the draft articles adopted on first reading in 2004, the view was expressed that the draft articles had been prematurely transmitted to the General Assembly, since the draft dealt only with the conditions for the exercise of diplomatic protection. No guidance was given on questions such as who could exercise such protection; how it should be exercised; what the consequences of its exercise were; how to evaluate harm in cases involving the exercise of diplomatic protection; and the justification of the rule, under article 2 of the draft articles, that only a State had the right to exercise diplomatic protection, while an individual had no actual right to be compensated, even if the State responsible discharged its obligations in terms of

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[157] *Preliminary Objections*, Judgment, *I.C.J. Reports*, 1992, p. 240 at p. 255, paras. 37-38. See also *Preliminary Objections of the Government of Australia*, December 1990, vol. I, part V, chap. II, sect. I, paras. 400-406.

compensation; as well as the general question of the degree of control that an individual should have in respect of an international claim, i.e., the extent to which an individual or legal person could require a Government to make a claim in the first place.

238. In addition, reservations were again expressed as to the resort to the *Mavrommatis* principle in the draft articles. In particular, while there was agreement with the position that diplomatic protection was a right of the State, it was maintained that the State's right to ensure respect for international law in the person of its national was an outdated concept. While it may have been relevant in 1924 - at the time of the *Mavrommatis* decision - it seemed unacceptable, 80 years later, to adhere to a fiction that had been created in response to a specific historical context while ignoring subsequent developments in the law, particularly as regards the status of individuals, and their protection, under international law. Under that view, the Commission had missed an opportunity to clarify that when a State exercised its right to exercise diplomatic protection, it did so on behalf of its national and not in order to ensure respect for its own right in the person of that individual.

(b) Special Rapporteur's concluding remarks

239. Regarding the suggestion that the draft articles include a consideration of the consequences of diplomatic protection, the Special Rapporteur recalled that the draft articles adopted on first reading focused on what was the accepted scope of diplomatic protection, both in the Sixth Committee and among most academic writers, i.e., the nationality of claims and the exhaustion of local remedies. He observed further that article 44 of the articles on Responsibility of States for internationally wrongful acts had also contemplated only those two issues, and that the commentary to that provision had made it clear that those matters would be taken up in the supplementary study on diplomatic protection.[158]

240. In addition, the Special Rapporteur was of the view that it was not necessary to deal with the consequences of diplomatic protection since they were already covered by the articles on Responsibility of States for internationally wrongful acts, with one exception, namely, whether a

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[158] See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77, footnotes 722 and 726.

State was under an obligation to pay over to an injured individual money that it had received by way of compensation for a claim based on diplomatic protection. While he agreed that that was an important issue, the options open to the Commission were either simply to codify well-established rules (even if that meant adopting what many members regarded as a retrogressive rule: that the State was not obliged to transfer money to the injured person) or to engage in progressive development and enunciate a new rule whereby the State was obliged to pay over to the injured individual money that it had received by way of compensation. In the light of the Commission's decision not to adopt a provision compelling States to exercise diplomatic protection on behalf of an individual, he had not detected a general willingness on the part of the Commission to engage in progressive development in respect of the payment of monetary compensation received by the State. His preference, therefore, was neither to expressly codify what many regarded as an unfortunate principle nor to attempt to progressively develop a new principle that would be unacceptable to States, but rather to leave the matter open in the draft articles so as to allow for further development in the law.

241. As regards the *Mavrommatis* principle, the Special Rapporteur recalled that it was generally acknowledged to be a fiction, with serious implications for the individual. For example, because the claim for diplomatic protection was seen to be that of the State and not of the individual, it was generally accepted that the State enjoyed discretion as to whether to bring the claim or not. He recalled that in his first report[159] he had proposed making it obligatory for States to exercise diplomatic protection where a norm of *jus cogens* had been violated in respect of the individual, but the proposal had been rejected on the ground that that would have meant engaging in progressive development. He acknowledged that the *Mavrommatis* principle was inconsistent and flawed in that, for example, it was not easy to reconcile with the principle of continuous nationality or with the exhaustion of local remedies rule. Yet, notwithstanding its flaws, the *Mavrommatis* principle was the basis of customary international law on the subject of diplomatic protection and for this reason it has been retained.

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[159] A/CN.4/506 and Corr.1 and Add.1.

CHAPTER VIII

EXPULSION OF ALIENS

A. Introduction

242. The Commission at its fiftieth session (1998) took note of the report of the Planning Group identifying, inter alia, the topic of "Expulsion of aliens" for possible inclusion in the Commission's long-term programme of work,[160] and which was subsequently done at the fifty-second session (2000).[161] A brief syllabus describing the possible overall structure of and approach to the topic was annexed to that year's report of the Commission.[162] In paragraph 8 of resolution 55/152 of 12 December 2000, the General Assembly took note of the topic's inclusion in the long-term programme of work.

243. During its fifty-sixth session, the Commission decided, at its 2830th meeting held on 6 August 2004, to include the topic "Expulsion of aliens" in its current programme of work, and to appoint Mr. Maurice Kamto as Special Rapporteur for the topic.[163] The General Assembly, in paragraph 5 of its resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

B. Consideration of the topic at the present session

244. At the present session, the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/554). The Commission considered the Special Rapporteur's report at its 2849th to 2852nd meetings, from 11 to 15 July 2005.

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[160] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 554.

[161] Ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729.

[162] Ibid., annex.

[163] Ibid., *Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364.

1. Introduction by the Special Rapporteur

245. The Special Rapporteur observed that the expulsion of aliens was an old question closely linked to the organization of human societies in the form of States. It remained of current interest because of the paradox between the existence of a globalized world, in terms of technology and economy, and barriers of political sovereignty operating like a filter between aliens which had the right to stay on the territory of a foreign country and those which did not. The subject raised important questions of international law and, because of the diversity of practices which it had generated on every continent, lent itself to codification. Expulsion of aliens affected all regions of the world, and, accordingly, there existed a significant body of national legislation which made it possible to ascertain general principles. Some such principles had already been incorporated into existing international human rights conventions.

246. It seemed to the Special Rapporteur that a preliminary report was necessary to set out his understanding of the subject to the Commission. Its purpose was simply to provide an overall view of the subject, while highlighting the legal problems which it raised and the methodological difficulties related to its consideration. The Special Rapporteur proposed a work plan (in annex I of his report) outlining the general plan of his future reports.

247. The report provided a basic sketch of the concept of the expulsion of aliens followed by a basic exposition of the concept of the "right to expel" in international law. In the Special Rapporteur's view, such customary international law right, inherent in the sovereignty of States, was not in question. The reasons for expulsion, however, could vary and not all were permissible under international law: such expulsion of an alien brought into play rights, particularly fundamental human rights, to which international law attached legal consequences to their violation.

248. In preparing the report, the Special Rapporteur had been confronted with questions of terminology, i.e. whether to speak of "expulsion" of aliens, which when looking at national legislation was a term covering a more limited phenomenon than removing aliens. Nevertheless, his tentative preference was to keep the term "expulsion", even if it had to be defined broadly. Similarly, it remained to be considered whether the reference to "aliens" was sufficiently accurate. In his opinion, it did cover all the categories of persons under consideration.

249. The Special Rapporteur sought guidance on a number of questions of methodology, in particular, as to what treatment was to be given to existing conventional rules, found in a number of human rights treaties. His inclination was to elaborate a complete regime, bearing in mind that, although treaty law would offer elements which might be included in the draft articles, a number of those rules arose initially from national legislation and also international jurisprudence developed in the context of global and regional human rights judicial instances.

250. The Special Rapporteur further requested that the Secretariat prepare a compilation of applicable national and international instruments, texts and jurisprudence on the topic.

2. Summary of the debate

(a) General comments

251. The Special Rapporteur was commended for his preliminary report. Several members commented on the importance of the subject, none the least because it affected the lives of large numbers of people around the world. It was observed that, as a constant and normal social phenomenon, the movement of people and national restrictions on such movement had important political, economic and social repercussions for international relations. The task for the Commission was to carefully consider all the rules on the topic existing in customary international law, in treaties and international agreements, State practice and internal laws; to develop them further where possible or where appropriate, and to codify them for clearer and better application. Support was further expressed for the Special Rapporteur's formulation of the key issue underlying the topic, i.e. how to reconcile the right to expel with the requirements of international law, particularly those relating to the protection of fundamental human rights.

252. In terms of a further view, there existed a general problem with the Commission's approach to commencing new topics - not limited to the topic under consideration - which was reminiscent of the collective preparation of a textbook, i.e. first defining the scope of the topic as well as the basic expressions and key concepts, followed by a process of identifying existing customary or treaty rules on the matter. While such questions had to be considered, it was necessary to first consider the interests involved in the expulsion of aliens and to identify the values that were affected by the typical cases of the expulsion of aliens, in short describing the

factual problems arising from the expulsion of aliens. Without such a preliminary consideration, it was difficult to foresee the intended direction of a legislative intervention in the field, resulting in drafts containing excessive generalities.

(b) The concept of the expulsion of aliens (scope and definitions)

253. For many members one of the central questions of the topic concerned the scope of the future study. The issue was considered problematic because of the connections between expulsion and admission of aliens, especially with regard to the return of irregular immigrants. It was maintained that an attempt by the Commission to address questions relating to immigration or emigration policies would negatively affect the prospects of the Commission's work. In terms of a further view, the central area of study was less the issue of expulsion or refusal of entry, and more that of the control that a State exercises over its territory. Expulsion was merely a modality for the exercise of such control.

254. While support existed for taking a broad approach to the topic, specific suggestions were made as to its limits. Hence, a preference was expressed for limiting the scope of the study to those measures which concerned resident aliens, with the possible inclusion of aliens who had stayed irregularly over a certain span of time. It was also suggested that the topic cover the removal of foreign nationals who had entered illegally or whose presence had become illegal as well as the removal of foreigners who were lawful in the country. Others preferred drawing a distinction between the expulsion of aliens who are legally present in a country and those who were not - a distinction recognized both in State practice and in relevant international agreements.[164] It was common for States to expel aliens solely on the basis of their illegal entry or presence. It was thus proposed that the topic either not cover the removal of persons who are not lawfully present, or, if it were decided to include such persons, to stipulate clearly that States have the right of expulsion without the need for other justification. It was also observed that account had to be taken of the fact that different categories of aliens existed, and that some such

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[164] See, e.g., *Convention on the Status of Refugees*, 28 July 1951, United Nations, *Treaty Series*, vol. 189, p. 137, article 32, and the *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, *Treaty Series*, vol. 999, p. 171, article 13.

categories enjoyed special status under the law of the foreign State in which they were residing. Reference was also made to the situation of illegal aliens whose presence in the territory of the host State was tolerated.

255. As regards questions to be excluded from the scope of the topic, it was suggested that the issues of refoulement, non-admission of asylum-seekers or refusal of admission for regular aliens should not be considered. Likewise, agreement was expressed with the Special Rapporteur's preference to exclude internally displaced persons (IDPs) and people in transit. It was also suggested that the topic not cover measures of expulsion taken by a State vis-à-vis its own nationals of an ethnic, racial or religious origin which is different to that of the majority of the population.

256. It was queried whether the Special Rapporteur intended to include large-scale population expulsions, particularly in situations of armed conflict. While references in the report seemed to suggest that such mass expulsions were to be covered, doubts were expressed as to the appropriateness of doing so. It was pointed out that the question of expulsion from occupied territories and during periods of armed conflict was covered by international humanitarian law and it was suggested that a "without prejudice" clause could eventually be included so as to cover the obligations of States under international humanitarian law relating to civilians. Others were of the view that, in light of their importance, consideration should be given to questions of forced exit of people in times of armed conflict. It was also suggested that international displacement of people at the outset of the creation of new States or dismemberment of a State or during periods of grave natural calamities should likewise not be considered.

257. General support was expressed for the Special Rapporteur's preference for retaining "expulsion" to be applied in a broad sense. It was noted that the term was commonly used to describe the removal of an alien from the territory of a State, either voluntarily under threat of forced removal or forcibly. In terms of another view even as a purely descriptive term, "expulsion" was of limited accuracy because it covered what was, in fact, a large variety of situations.

258. As regards the tentative definition of "expulsion" in paragraph 13 of the report,[165] the view was expressed that it was too narrow since it did not include stateless persons and because it implied that expulsion consisted in a *formal* measure aimed at turning an individual out of a territory. Reference was made to existing case-law recognizing the fact that an "expulsion" may be considered to have taken place even in exceptional cases where the alien leaves a country without being directly and immediately forced or officially ordered to do so.[166] It was also noted that many of the legitimate actions resulting in the transfer of a foreign national out of the jurisdiction of the receiving State were taken under laws relating to immigration or laws for the temporary entry of business or tourist purposes. It was further suggested that the term "expulsion" should be viewed broadly so as to cover the situation of aliens being prevented from entering within the jurisdictional control of the State concerned, for example, on the high seas or on board a plane of the expelling State in a third State without necessarily physically crossing the territory.

259. In terms of another view, the definition of "expulsion" in paragraph 13 was too broad in that it could be read to include the transfer of an alien to the authorities of another Government for law enforcement purposes, such as extradition for the purpose of prosecution, as well as the expulsion of diplomatic personnel. The preference was expressed for excluding such actions from the scope of the topic since transfers for law enforcement purposes involved an entirely different set of issues, legal norms and policy considerations. Similarly diplomatic personnel were already adequately covered by their own laws and institutions.

260. Concerning the term "alien", it was pointed out that there existed a number of distinct categories of persons residing in territories other than that of their nationality and subject to different legal regimes. These included political refugees (whose status in Latin America was governed by the 1954 *Caracas Convention*[167]), asylum-seekers and refugees (regulated by the

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[165] "[A] legal act in which a State compels an individual or group of individuals who are nationals of another State to leave its territory" (A/CN.4/554, para. 13).

[166] See *International Technical Products Corporation v. Islamic Republic of Iran*, 9 *I.U.S.C.T.R.* (1985), p. 10.

[167] *Convention on Territorial Asylum*, concluded by the Organization of American States on 28 March 1954, United Nations, *Treaty Series*, vol. 1438, p. 127.

Convention relating to the Status of refugees of 1951 and its 1967 protocol[168]), migrant workers (whose rights were protected by the 1990 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*[169]), and stateless persons (covered by the 1954 and 1961 Conventions[170]).

(c) The right to expel

261. With regard to the question of the sovereign "right" of the State to expel aliens, it was observed that such right was generally recognized under international law, albeit subject to certain limits, mostly in the context of human rights law (as discussed in the next section). The view was expressed that such right gave rise to many questions, including whether it is an inalienable right of the State, and whether it could be resorted to only in certain situations (such as for purposes of national security, or for the maintenance of public order). The key was how to reconcile such right with the limits that international law imposed on it. At the same time, it was noted that any such limitations of the right of the State should be clearly defined in line with existing limits arising from treaties and custom universally recognized in times of war and peace.

262. Others expressed doubts as to the approach in the report of giving such a priori status to States' right to expel, while relativizing human rights standards. It was conceded that there existed situations where the State might be justified in expelling aliens, but there still was no reason for describing such right in as forceful a way as was done in the report. A preference was further expressed for not using qualifiers, such as "absolute" or "discretionary", when referring to the State's "right" to expel.

(d) Grounds for expulsion

263. It was observed that the right of a State to expel was necessary as a means of protecting the rights of the society which existed within the territory of the State. However, while a State

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[168] Adopted on 4 October 1967, United Nations, *Treaty Series*, vol. 606, p. 267.

[169] Adopted on 18 December 1990, United Nations document A/RES/45/158, Annex.

[170] *Convention relating to the status of Stateless Persons*, 28 September 1954, United Nations, *Treaty Series*, vol. 360, p. 117, and the *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, *Treaty Series*, vol. 989, p. 175.

had a wide discretion in exercising its rights to expel aliens, this discretion was not absolute and had to be balanced against existing fundamental human rights protections, including, for example, article 13 of the *International Covenant on Civil and Political Rights*, which provided, inter alia, that "[a]n alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law ...". Similarly, customary international law demanded that the State must not abuse its rights by acting arbitrarily in taking its decision to expel an alien, nor act unreasonably in carrying out the expulsion. The State of nationality of an alien expelled could assert the right to inquire into the reasons for his expulsion.[171] The reasons for the expulsion would have to be stated before an international tribunal when the occasion demanded it. Expulsion was not to be carried out with hardship or violence or unnecessary harm to the alien involved. Compulsion and detention of an alien under an expulsion order had to be avoided, except in cases where the alien refused to leave or tried to escape from control of the State authorities. The alien had also to be given a reasonable time to settle his or her personal affairs before leaving the country,[172] and to be allowed to choose the country he or she wished to apply for admission to.

264. At the same time, it was conceded that the position under customary international law remained uncertain, since many municipal systems provided that the authorities of a country could deport aliens without having to provide reasons. Doubts were also expressed as to the requirement, mentioned in the Special Rapporteur's report, that "the State resorting to expulsion is bound to invoke the grounds used to justify it".[173] It was not clear that, in the absence of a dispute or another State or institution raising issues, the territorial sovereign had an original duty to invoke grounds of justification.

265. It was further suggested that the study should consider a set of issues, other than the absence of admissible motives, which equally related to the question whether a given expulsion was consistent with international law. These included: (1) taking into account provisions in international human rights conventions requiring a decision on expulsion to be taken "in

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[171] See, *Boffolo* case, *U.N.R.I.A.A.*, vol. X (1903), p. 528.

[172] See, *Yeager v. Iran, 17 I.U.S.C.T.R.* (1987), p. 92; *82 I.L.R.*, p. 179, at pp. 196-197.

[173] A/CN.4/554 at para. 16.

accordance with law",[174] which covered not only procedure but also the conditions for expulsion; (2) the application of the principle of non-discrimination so as to invalidate, as a matter of international law, decisions on expulsion taken on a discriminatory basis;[175] (3) balancing a State's interest in expelling with the individual's right to private and family life;[176] and (4) considering the question of the risk that an individual's rights might be infringed in the State of destination.[177] In terms of another suggestion, consideration could also be given to the situation where the alien had been awarded the right of residence, or was otherwise domiciled, as another limitation on expulsion.

(e) Rights related to expulsion

266. It was noted that contemporary international law recognized the rights of individuals to just and fair procedures for expulsion and placed requirements and obligations on the State to ensure such procedures.[178] It was suggested that the act of expulsion must be formal in order for the person concerned to be afforded an opportunity to appeal. It was also suggested that particular consideration be given to procedural guarantees with regard to individual expulsions, including remedies, especially those remedies capable of preventing expulsion since it would be

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[174] See, the *International Covenant on Civil and Political Rights*, supra, note 164, article 13, the *American Convention on Human Rights*, concluded by the Organization of American States on 22 November 1969, United Nations, *Treaty Series*, vol. 1144, p. 123, article 22 (6); and the *African Charter on Human and Peoples' Rights*, concluded by the Organization of African Unity on 27 June 1981, United Nations, *Treaty Series*, vol. 1520, p. 217, article 12 (4).

[175] See, *Aumeeruddy-Cziffra v. Mauritius*, No. 35/1978, decision of 9 April 1981, United Nations document CCPR/C/12/D/35/1978.

[176] See, e.g., *Berrehab v. The Netherlands*, No. 3/1987/126/177 (judgment of 21 June 1988), ECHR Ser. A, No. 138, and *Slivenko v. Latvia* [GC], No. 48321/99 (judgment of 9 October 2003), para. 113, ECHR 2002-II.

[177] See, e.g., the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, *Treaty Series*, vol. 1465, p. 85, article 3, and the *American Convention on Human Rights*, supra, note 174, article 22 (8).

[178] See, e.g., *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted by the Council of Europe on 22 November 1984, *E.T.S.* 117. See too the *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live*, General Assembly resolution 40/144 of 13 December 1985, article 7.

difficult for an alien who had been expelled to a distant country to effectively resort to an available remedy and have such expulsion measure effectively repealed. Other suggestions included: specifying that such fundamental guarantees applied to the entire process of expulsion, and not only to the procedure for the examination of individual cases; specifying the obligation of the expelling State to notify the alien concerned of the decision to expel and granting the alien the right to appeal such decision; requiring that the implementation of the decision to expel not be inhumane, degrading or humiliating for the person being expelled; requiring the establishment of procedures applicable to all decisions of expulsion relating, inter alia, to: due process of law, non-discriminative access to justice; access to legal aid for those who need it; protection of personal property; protection of investments; and respect for applicable international obligations. It was also noted that the lawfulness of the expulsion was to be measured against the degree to which it complied with the procedures laid down under the domestic law of the expelling State; although it was not clear whether a sufficient number of States did regulate through their national legislation the procedures used for expelling aliens.

267. Opposition was expressed as to the existence of the "right" of collective expulsion. It was maintained that, in the twenty-first century, collective expulsions should be treated as prima facie prohibited. At best, a clear presumption in favour of their prohibition had to be established. It was added that while an expulsion may involve a group of people sharing similar characteristics, the decision to expel should nonetheless be taken at the level of the individual and not the group. In terms of another view, the term "collective" required further precision as it was not clear how many individuals would constitute a "collective" expulsion. Others maintained that such issues should be considered separately from that of the treatment of migrant workers, in which case the relevant international treaties would prevail. Similarly, it was suggested that the Special Rapporteur consider existing bilateral repatriation agreements as possible models for establishing regulations in this area

268. Some members agreed with the Special Rapporteur's suggestion that some consideration be given to the question of the consequences, under international law, of an expulsion of aliens, in terms of the State responsibility and diplomatic protection. Other members expressed reservations since such matters were taken into account by other topics both previously and currently before the Commission. It was suggested that, in the initial phases of the consideration

of the topic, the focus instead be placed on the basic questions of the rights and duties of States with respect to expulsion, leaving for a later stage the question of whether to attempt to elaborate on the consequences for breaches of those duties.

(f) Methodological issues

269. Many members expressed support for the Special Rapporteur's proposal that the focus be on drafting articles covering all aspects of expulsion, and not merely providing a set of residual principles. It was maintained that a simple body of general principles would not be fully operational, nor would it be particularly useful or effective. It was suggested that a future set of draft articles could include a provision allowing for the application of treaties - whether universal or regional - giving further protection to the individuals concerned. Others expressed concern as to what an exhaustive regime would involve. It was suggested that the topic should not cover other settled rules, and that the task should be limited to bridging the gaps where these could be clearly identified.

270. The Special Rapporteur was further encouraged to undertake a detailed consideration of existing customary international law and treaty law, including a comparative study of international case law both at the global and regional levels as well as of national laws and practice.

3. Special Rapporteur's concluding remarks

271. The Special Rapporteur noted no basic disagreement in the Commission with regard to the approach being taken to the subject, with the exception of the suggestion that the study commence with a consideration of the issues and interests at stake. In response, the Special Rapporteur noted that some of those issues had been raised in the introductory part of his report, and that it was the well-established practice of the Commission to study a topic with a view to identifying rules of customary international law or those rules pertaining to the progressive development of international law.

272. As for the points of agreement in the Commission, the Special Rapporteur noted that support existed for: retaining the current title of the topic, while defining its two component terms; the proposition that the central problem of the subject concerned reconciling the right to

expel with the requirements of international law, in particular with the rules of international human rights law; carefully delimiting the scope of the topic; and not considering questions of refusal of admission and immigration, movements of population or situations of decolonization or self-determination, nor the position of the occupied territories in the Middle East. Many members also expressed support for the methodology proposed in the report, namely that a comprehensive legal regime be drawn up recognizing, where necessary, the provisions of existing international conventions. He also acknowledged those who suggested that the topic be undertaken on the basis of a comparative analysis and criticisms of national legislation in the area, and drawing on the jurisprudence of global, regional and human rights instances. The general outline proposed by the Special Rapporteur had, likewise, been approved by most members of the Commission, with the reservation that some answers to particular questions needed to be provided.

273. The Special Rapporteur further provided a detailed overview of the discussion. He agreed with those members who suggested that "expulsion" be defined so as not necessarily to require the taking of a formal act in all cases. In addition, the qualifications suggested by the Commission on the concept of "alien" would be covered in the provision on scope, which would include a clear indication of the different categories of persons to be covered. To his mind, that would include persons residing in the territory of a State of which they do not have nationality, with the distinction being made between persons in a regular situation and those in an irregular situation (including those who have been residing for a long time in the State seeking to expel them). The topic would also cover refugees, asylum-seekers, stateless persons and migrant workers in the definition. He also accepted the suggestion that the question of the expulsion of stateless persons to a State where they maintain residence be considered separately.

274. On the other hand, as had been pointed out in the debate, it would be difficult to include in the topic denial of admission. Another category not covered by the scope would be persons whose nationality status changed because of a change in the status of territory where they were resident, in the context of decolonization. He noted further that, while his preference was not to enter into questions of the nationality of persons expelled during an armed conflict, he did not intend to totally discard the rules of armed conflict from the topic because international humanitarian law included precise rules on expulsion of aliens.

CHAPTER IX

UNILATERAL ACTS OF STATES

A. Introduction

275. In the report on the work of its forty-eighth session (1996), the Commission proposed to the General Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law.[179]

276. The General Assembly, in paragraph 13 of resolution 51/160, inter alia, invited the Commission to further examine the topic "Unilateral Acts of States" and to indicate its scope and content.

277. At its forty-ninth session (1997), the Commission established a Working Group on the topic which reported to the Commission on the admissibility and feasibility of a study on the topic, its possible scope and content and an outline for a study on the topic. At the same session, the Commission considered and endorsed the report of the Working Group.[180]

278. Also at its forty-ninth session, the Commission appointed Mr. Victor Rodríguez Cedeño, Special Rapporteur on the topic.[181]

279. The General Assembly, in paragraph 8 of its resolution 52/156, endorsed the Commission's decision to include the topic in its work programme.

280. At its fiftieth session (1998), the Commission had before it and considered the Special Rapporteur's first report on the topic.[182] As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

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[179] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 249 and pp. 328-329.

[180] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), para. 194 and paras. 196-210.

[181] Ibid., paras. 212 and 234.

[182] A/CN.4/486.

281. The Working Group reported to the Commission on issues related to the scope of the topic, its approach, the definition of unilateral act and the future work of the Special Rapporteur. At the same session, the Commission considered and endorsed the report of the Working Group.[183]

282. At its fifty-first session (1999), the Commission had before it and considered the Special Rapporteur's second report on the topic.[184] As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

283. The Working Group reported to the Commission on issues related to: (a) the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic, as well as for gathering relevant State practice; (b) the setting of general guidelines according to which the practice of States should be gathered; and (c) the direction that the work of the Special Rapporteur should take in the future. In connection with point (b) above, the Working Group set the guidelines for a questionnaire to be sent to States by the Secretariat in consultation with the Special Rapporteur, requesting materials and enquiring about their practice in the area of unilateral acts as well as their position on certain aspects of the Commission's study of the topic.

284. At its fifty-second session (2000), the Commission considered the third report of the Special Rapporteur on the topic,[185] along with the text of the replies received from States[186] to the questionnaire on the topic, which was circulated on 30 September 1999. The Commission at its 2633rd meeting, on 7 June 2000, decided to refer revised draft articles 1 to 4 to the Drafting Committee and revised draft article 5 to the Working Group on the topic.

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[183] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), paras. 192-200.

[184] A/CN.4/500 and Add.1.

[185] A/CN.4/505.

[186] A/CN.4/500 and Add.1.

285. At its fifty-third session (2001), the Commission considered the fourth report of the Special Rapporteur[187] and established an open-ended Working Group. At the recommendation of the Working Group, the Commission requested that a questionnaire be circulated to Governments inviting them to provide further information regarding their practice of formulating and interpreting unilateral acts.

286. At its fifty-fourth session (2002), the Commission considered the fifth report of the Special Rapporteur,[188] as well as the replies received from States to the questionnaire on the topic, which was circulated on 31 August 2001.[189] The Commission also established an open-ended Working Group.

287. At its fifty-fifth session (2003), the Commission considered the sixth report of the Special Rapporteur.[190]

288. At its 2771st meeting, the Commission established an open-ended Working Group on Unilateral Acts of States, chaired by Mr. Alain Pellet. The Working Group held six meetings.

289. At its 2783rd meeting, held on 31 July 2003, the Commission considered and adopted the recommendations contained in Parts 1 and 2 of the Report of the Working Group on the scope of the topic and the method of work.[191]

290. At its fifty-sixth session (2004), the Commission considered the seventh report of the Special Rapporteur.[192]

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[187] A/CN.4/519.

[188] A/CN.4/525 and Add.1, Corr.1, Corr.2 (Arabic and English only) and Add.2.

[189] A/CN.4/524.

[190] A/CN.4/534.

[191] See *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), paras. 303-308.

[192] A/CN.4/542 and Corr.1 (French only), Corr.2 and Corr.3.

291. At its 2818th meeting, on 16 July 2004, the Commission established an open-ended Working Group on Unilateral Acts of States, chaired by Mr. Alain Pellet. The Working Group held four meetings.

292. At its 2829th meeting, on 5 August 2004, the Commission took note of the oral report of the Working Group.

293. The Working Group agreed to retain a sample of unilateral acts sufficiently documented to allow for an in-depth analysis. It also established a grid which would permit to use uniform analytical tools.[193] Individual members of the Working Group took up a number of studies, which would be effected in accordance with the established grid. It was agreed that these studies should be transmitted to the Special Rapporteur before 30 November 2004. It was decided that the synthesis, on the basis exclusively of these studies, would be entrusted to the Special Rapporteur who would take them into consideration in order to draw the relevant conclusions in his eighth report.

B. Consideration of the topic at the present session

294. At the present session, the Commission had before it the Special Rapporteur's eighth report (A/CN.4/557) which it considered at its 2852nd, 2853rd, 2854th and 2855th meetings on 15, 19, 20 and 21 July 2005.

1. Introduction by the Special Rapporteur of his eighth report

295. Introducing his eighth report on unilateral acts of States, the Special Rapporteur reminded the Commission that the working group chaired by Mr. Pellet had selected and discussed several examples of State practice in accordance with the list of criteria it had established.[194]

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[193] The Grid included the following elements: (a) Date; (b) Author/Organ; (c) Competence of author/organ; (d) Form; (e) Content; (f) Context and Circumstances; (g) Aim; (h) Addressees; (i) Reactions of Addressees; (j) Reactions of third parties; (k) Basis; (l) Implementation; (m) Modification; (n) Termination/Revocation; (o) Legal scope; (p) Decision of a judge or an arbitrator; (q) Comments; (r) Literature.

[194] Ibid.

296. The Special Rapporteur also alluded to the discussions in the Sixth Committee, where the need to establish a definition of unilateral acts and some general rules that could apply to them had been mentioned. Any such definition should be flexible enough to allow States some room for manoeuvre.

297. The first part of the report offered a fairly detailed presentation of 11 examples or types of unilateral acts of various kinds. The examples were a fairly broad and representative sample of unilateral acts ranging from a diplomatic note on recognition of one State's sovereignty over an archipelago to statements by the authorities of a United Nations host country about tax exemptions and other privileges and immunities.

298. The examples selected also contained statements of general application, renouncing sovereignty over a Territory, or protesting about the legal regimes applicable to the territorial seas of Caspian Sea States.

299. The second part of the report presented the conclusions drawn from the cases discussed. It was noted that the acts varied widely in form, content, authors and addressees. The addressees could be specific States, international organizations, groups of States or the international community as a whole.

300. The Special Rapporteur hoped that the discussion of the acts analysed in his report would be constructive, and that they might lead to a definition of unilateral acts of States such as had been called for in the Sixth Committee.

2. Summary of the debate

301. Several members voiced satisfaction over the examples analysed in the eighth report and said that the topic was one of constant interest to them. Some, however, said that the conclusions should have been set out in greater detail.

302. Some members thought it was evident from the study of the examples cited in the eighth report that the existence of unilateral acts producing legal effects and creating

specific commitments was now beyond dispute, a point that could be corroborated by international jurisprudence.[195]

303. On the other hand, for some members, the diversity of effects and the importance of the setting in which acts occurred made it very difficult to arrive at a "theory" or "regime" of unilateral acts. Some other members, however, thought that it was possible to establish such a regime. It was pointed out that while some factors, such as the timing or, perhaps, the form of acts, did not appear to play a decisive role, others, such as the essence of an act, who performed it and on what authority, seemed to be crucial features. That being so, the part played by the addressees, their reactions and the reactions of third parties should not be overlooked. It was therefore pointed out that the practice studied so far, supplemented perhaps by further study of other acts (for example those on which there was International Court of Justice case law, such as the Frontier dispute between Burkina Faso and the Republic of Mali),[196] might provide the basis for a formal definition that nevertheless retained some flexibility. It might thus be possible to consider enlarging the circle of persons who could enter into commitments binding on the State beyond that defined by article 7 of the Vienna Convention on the Law of Treaties by studying cases of declarations of other members of the executive, as well as legislative acts and judicial decisions. A position should also be reached on certain questions of terminology (the difference between unilateral acts in the strict sense and conduct) and questions relating to the *form* of unilateral acts (e.g. written or oral statements). The consequences of unilateral acts and the question of responsibility in the event that the resulting obligations were breached could be studied later on.

304. The value of the topic, it was said, was that it showed States the extent to which they could be bound by their own voluntary commitments. It was therefore necessary to identify the conditions under which constraints arose in order to avoid "surprises".

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[195] *Legal status of Eastern Greenland, P.C.I.J. Reports*, Ser. A/B, No. 43, p. 22 at p. 71; *Nuclear Tests (Australia v. France), I.C.J. Reports*, 1974, p. 253 at pp. 266-267; *Nuclear Tests (New Zealand v. France), I.C.J. Reports*, 1974, p. 457 at pp. 471-472; *Temple of Preah Vihear (Cambodia v. Thailand), I.C.J. Reports*, 1962, p. 6 at 21.

[196] *Frontier Dispute (Burkina Faso v. Mali), I.C.J. Reports*, 1986, p. 554.

305. After establishing a definition (which could extend to several draft articles, all as precise as possible), therefore, the Commission should study the capacity and authority of the author of a unilateral act. It would be premature to study State conduct which might have consequences equivalent to those of unilateral acts.

306. As regards the validity of unilateral acts, one of the hardest aspects of the topic and one bound up with the capacity and authority of the author, it would be helpful to make a comparison with the relevant provisions of the Vienna Convention on the Law of Treaties in order to determine the hierarchy and distribution of authority between international and domestic law as regards the formulation and performance of international commitments.

307. A summary of the Commission's work on the subject, in the form of a declaration accompanied by general or preliminary conclusions and covering all the points which had been accepted by consensus, was suggested. The starting point for such conclusions could be that international law attributed certain legal effects to acts freely undertaken by States without other States necessarily being involved. The conclusions could also address the form (written or unwritten) of unilateral acts, their effects, their considerable variety, their relationship to the principle of good faith, when they were performed and when they produced effects, and the conduct by which States evidenced an intent entailing legal consequences.

308. It was pointed out that other factors also needed to be taken into account in arriving at such preliminary conclusions, such as addressees' reactions and the domestic procedures for performance of the unilateral act.

309. It was also important not to overlook the need to ensure that States were still free to make political statements at any time without feeling constrained by the possibility of having to accept legal commitments.

310. Another view expressed was that so-called unilateral acts were so diverse, and so various and complex in nature, that they could not be codified in the form of draft articles. It would not be possible to compile an exhaustive list, and the value of such an undertaking was therefore questionable. It might even be wondered whether the underlying notion of a legal act was sufficiently universal and well recognized. An "expository" study of the topic would thus be the

best way to proceed, since the setting in which acts were performed was crucial to their identification. Not even the existence of international jurisprudence responding to particular needs or arguments in each case was sufficient justification for taking a fundamentally theoretical approach to unilateral acts. Producing draft articles could lead to misunderstandings and further confuse an already complicated and difficult topic.

311. It was also pointed out that unilateral acts could only be identified as such ex post facto. They were in essence a tr[illegible] mechanism which could result in rights (but not obligations) being attributed to third St[illegible] at was what distinguished them from treaties, which operated in a strictly reciprocal framework. In fact, they appeared at a necessary but insufficient threshold for the establishment of an appropriate analytical model. Where that threshold, by nature vague and variable, actually lay would be extremely difficult to determine.

312. On the other hand, it was observed that the task at hand was precisely to determine exactly where the threshold lay, uncertain and difficult though it appeared to be to grasp beyond what point States would be bound. Even if that point were to be identified ex post facto, it would at least not be identified arbitrarily. But the important thing was to establish, by means of codification, a mechanism for identifying such acts even before the fact. It was, moreover, untrue to say that States could not impose obligations on other States by means of unilateral acts. Acts having to do with the delimitation of maritime areas proved the contrary. The opinion was also expressed that, in essence, the Commission needed to define the lawfulness or validity of unilateral acts.

313. It was also pointed out that States' intentions were still crucial. While the intent to enter into commitments or create legal obligations depended on the circumstances and the setting, it could often be identified only by the form it took. On the other hand, the fact that form per se did not appear to be decisive in the identification of a unilateral act differentiated unilateral acts from international treaties.

314. According to some members, it would in any event be difficult to agree on general rules, and the Commission should therefore aim in the direction of guidelines or principles which could help and guide States while providing for greater certainty in the matter.

315. It was also pointed out that, besides States' intentions and the conditions, the authorization, the authority or the competence and capacity of the author and the deciding factors which gave an act its legal effect, if the topic was to be thoroughly studied, consideration must be given to the revocability of a unilateral act. If such acts were not accepted by other States or did not raise any legitimate expectations for these States, or treated as a basis for valid legal engagements by other States, they could in theory be revoked at will.

316. Some members remarked that the unilateral acts *par excellence* that ought to be examined, were autonomous acts qualifying as sources of international law and not as those stemming from a customary source. The term autonomous act should not be confused with auto-normative acts (imposing obligations on the author) and hetero-normative acts (imposing obligations on other States).

3. Special Rapporteur's concluding remarks

317. Summarizing the discussion, the Special Rapporteur mentioned the great difficulty of identifying unilateral acts as sources of international law. Although some members saw no value in codifying unilateral acts, the establishment of principles for identifying the legal regime applicable to such acts would without question make for greater certainty and stability in international relations. Besides, guaranteed confidence and stability needed to be kept in balance with States' freedom of action.

318. When taking States' freedom of action into consideration, it went without saying that there were political acts by which States did not intend to enter into legal obligations. Although it was sometimes difficult to tell the two kinds of acts apart, it was nevertheless true that the intent of the State to commit itself was an important feature of the identification.

319. The fact that by a unilateral act a relation may be established with one or more States, it does not mean that we are necessarily in the presence of an act of conventional character.

320. The conduct of the State should also be considered in relation to the unilateral act, though that could be done at a later stage.

321. Reaching a common position on the definition did not seem easy; at all events, a number of factors or elements unrelated to the act itself would have to be taken into consideration.

322. On the question of legal effects, these, although highly diverse (promises, renunciation, recognition, etc.), needed to be considered in the light of their conformity with international law.

323. The 1969 Vienna Convention on the Law of Treaties might provide a framework and guidance for the formulation of a number of principles on unilateral acts, but they should not be transposed or reproduced wholesale given the difference in kind between treaties and unilateral acts.

324. The Special Rapporteur had deliberately reached only limited conclusions in his report; they were the outcome of a study of specific, practical cases, and could be supplemented and fleshed out by studies of further cases or by the comments and observations of Commission members.

325. The Special Rapporteur concluded by suggesting that he would be entirely in favour of the proposal that he should submit general conclusions or proposals the following year.

326. The Working Group on Unilateral Acts could consider the points that had arisen out of debate, and put forward recommendations as to the orientation and substance of the proposals which would thus reflect the outcome of several years of work on the subject by the Commission.

4. Conclusions of the Working Group

327. The open-ended Working Group on Unilateral Acts of States, chaired by Mr. Alain Pellet, was reconstituted on 11 May 2005.

328. The Working Group held four meetings, on 11 and 18 May, 1 June and 25 July 2005. The first three meetings were devoted to an analysis of specific cases in accordance with the grid established at the fifty-sixth session of the Commission (2004) and the conclusions that could be drawn from that analysis.

329. At its 2855th meeting, on 21 July 2005, at the conclusion of the debate on the topic "Unilateral acts of States", the Commission requested the Working Group to consider the points raised in the debate on which there was general agreement that might form the basis of preliminary conclusions or proposals on the topic that the Commission could consider at its fifty-eighth session. The Working Group began its consideration of elements that could be included in preliminary conclusions without prejudice to their subsequent qualification.

330. At its 2859th meeting, on 28 July 2005, the Commission took note of the oral report of the Working Group.

331. The Working Group acknowledged that, while it could be stated in principle that the unilateral conduct of States could produce legal effects, whatever form that unilateral conduct might take, it would attempt to establish some preliminary conclusions in relation to unilateral acts *stricto sensu*. The Working Group also briefly considered questions relating to the variety of unilateral acts and their effects, the importance of circumstances in assessing their nature and effects, their relationship to other obligations of their authors under international law and the conditions of their revision and revocability.

332. The Working Group stands ready to assist the Special Rapporteur, if necessary, in the elaboration and development of preliminary conclusions, which could then be submitted to the Commission at the fifty-eighth session (2006), together with illustrative examples of practice drawn from the notes prepared by members of the Group.

CHAPTER X

RESERVATIONS TO TREATIES

A. Introduction

333. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its agenda the topic "The law and practice relating to reservations to treaties".

334. At its forty-sixth session (1994), the Commission appointed Mr. Alain Pellet, Special Rapporteur for the topic.[197]

335. At its forty-seventh session (1995), the Commission received and discussed the first report of the Special Rapporteur.[198]

336. Following that discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission's consideration of the topic; they related to the title of the topic, which should now read "Reservations to treaties"; the form of the results of the study, which should be a guide to practice in respect of reservations; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[199] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. As far as the Guide to Practice was concerned, it would take the form of draft guidelines with commentaries, which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses.

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[197] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), para. 382.

[198] A/CN.4/470 and Corr.1.

[199] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 491.

337. In 1995, the Commission, in accordance with its earlier practice,[200] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it to continue its work along the lines indicated in its report and also inviting States to answer the questionnaire.[201]

338. At its forty-eighth session (1996), the Commission had before it the Special Rapporteur's second report on the topic.[202] The Special Rapporteur had annexed to his report a draft resolution of the International Law Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[203]

339. At its forty-ninth session (1997), the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[204]

340. In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the International Law Commission of having their views on the preliminary conclusions.

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[200] See *Yearbook ... 1993*, vol. II (Part Two), para. 286.

[201] As of 31 July 2003, 33 States and 25 international organizations had answered the questionnaire.

[202] A/CN.4/477 and Add.1.

[203] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 137.

[204] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), para. 157.

341. From 1998 until its fifty-sixth session in 2004 the Commission considered 7 more reports[205] by the Special Rapporteur[206] and provisionally adopted 69 draft guidelines and the commentaries thereto.

342. At its fifty-sixth session the Commission, at its 2822nd meeting, on 23 July 2004, after having considered the ninth report of the Special Rapporteur[207] decided to refer draft guidelines 2.6.1 "Definition of objections to reservations" and 2.6.2 "Objection to the late formulation of widening of the scope of a reservation" to the Drafting Committee.

B. Consideration of the topic at the present session

343. At the current session, the Commission had before it the tenth report of the Special Rapporteur (A/CN.4/558 and Add.1) on validity of reservations and the concept of the object and purpose of the treaty.

344. The Commission considered part of the tenth report of the Special Rapporteur at its 2854th, 2856th, 2857th, 2858th and 2859th meetings, from 20 to 28 July 2005.

345. At its 2859th meeting, held on 28 July 2005, the Commission decided to send draft guidelines 3.1 (Freedom to formulate reservations), 3.1.1 (Reservations expressly prohibited by the treaty), 3.1.2 (Definition of specified reservations), 3.1.3 (Reservations implicitly permitted by the treaty) and 3.1.4 (Non-specified reservations authorized by the treaty) to the Drafting Committee. The Commission also decided to send draft guidelines 1.6 and 2.1.8, which had already been provisionally adopted, to the Drafting Committee with a view to their revision in the light of the terms selected. The Commission also decided to continue its consideration of the tenth report during its fifty-eighth session (2006).

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[205] Third report (A/CN.4/491 and Corr.1 (English only), Add.1, Add.2 and Corr.1, Add.3 and Corr.1 (A/F/R only), Add.4 and Corr.1, Add.5 and Add.6 and Corr.1); Fourth report (A/CN.4/499); Fifth report (A/CN.4/508, Add.1, Add.2, Add.3 and Add.4); Sixth report (A/CN.4/518 and Add.1-3); Seventh report (A/CN.4/526 and Add.1-3); Eighth report (A/CN.4/535 and Add.1) and Ninth report (A/CN.4/544).

[206] For a detailed historical presentation, see *Official Records, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 257-269.

[207] A/CN.4/544.

346. At its 2842nd meeting, on 20 May 2005, the Commission considered and provisionally adopted draft guidelines 2.6.1 (Definition of objections to treaties) and 2.6.2 (Definition of objections to the late formulation or widening of the scope of a reservation).

347. Those draft guidelines had already been sent to the Drafting Committee at the fifty-sixth session (2004).

348. At its 2865th meeting, on 4 August 2005, the Commission adopted the commentary relating to the aforementioned draft guidelines.

349. The text of the draft guidelines and the commentary thereto are reproduced in section C.2 below.

1. Introduction by the Special Rapporteur of his tenth report

350. The Special Rapporteur introduced his tenth report by explaining that he had initially planned to include an introduction summing up developments since the ninth report; a first part, which would have dispatched once and for all the problem of formulation and the procedure for objections and reservations to treaties; and a second part, on the validity of reservations. For lack of time, and having already begun work on the latter question, to which he had given priority, it had not been possible to adhere to that plan. Accordingly, the report had begun *in medias res*, with the section on validity of reservations.

351. The Special Rapporteur had first sought to defend the expression "validity of reservations" before addressing, in section A, the principle derived from the *chapeau* of article 19 of the Vienna Convention and the problems raised by express or implicit prohibitions of reservations, covered in subparagraphs (a) and (b) of that article. The other questions addressed in the report related to the compatibility of reservations with the object and purpose of the treaty, stipulated in article 19 (c) (validity or invalidity of reservations relating to the application of internal law, customary rules or the rules of *jus cogens*).

352. The last part of the report addressed the determination of the validity of reservations and the consequences thereof.

353. Returning to the phrase "validity of reservations" used in his report, the Special Rapporteur recalled that the replies from States in the Sixth Committee to the question that the Commission had put to them concerning that expression had been inconclusive, having been split between those States that had doubts about the expression and those that accepted it.

354. The Special Rapporteur clearly preferred the words "validity/invalidity", which were entirely neutral, to the other terms proposed, such as "admissibility/inadmissibility", "permissibility/impermissibility" or "opposability/non-opposability", which had strong doctrinal connotations.

355. The doctrinal battle pitted the proponents of permissibility, who thought that a reservation could be intrinsically invalid by being contrary to the object and purpose of the treaty, against the advocates of opposability, for whom the reservations regime was governed in its entirety by the reactions of other States. In using one or the other of those expressions, the Commission would be taking a position in favour of one of those schools, which did not do justice to the complex reality of the regime of reservations.

356. Although Mr. Derek Bowett had urged the Commission to use the terms "permissible/impermissible" and the Commission had initially followed his lead, the Special Rapporteur thought that a reservation could be valid or invalid on grounds other than "permissibility".

357. Furthermore, the French terms "Licéité/illicéité" which are translated in English as "permissibility/impermissibility" could be misleading, given their relationship to the topic of State responsibility. It was unreasonable to affirm that a reservation not valid for reasons of form or substance entailed the responsibility of the State or international organization that had formulated it, and no precedent to that effect existed in State practice. Such a reservation would simply be null and void.

358. The Commission should therefore revert to the neutral terms "validity/invalidity", including in the draft guidelines that had already been adopted (1.6 and 2.1.8), in which the words "permissible/impermissible" had been left in square brackets.

359. The section of the report entitled "Presumption of validity of reservations" was based on the *chapeau* of article 19 of the Vienna Conventions, which established the general principle that the formulation of reservations was permitted. However, the freedom to formulate a reservation was not unlimited. In the first place, it was limited in time (signature of the treaty or expression of consent to be bound by it). In addition, by its nature a treaty could require that a reservation should be unanimously accepted. Moreover, States could themselves limit the power to formulate reservations to a treaty, as envisaged in article 19, subparagraphs (a) and (b).

360. Consequently, the right to formulate reservations was not an absolute right. That was suggested by the very title of article 19, since the fact that a reservation was formulated did not mean that it was "made", i.e. that it would actually produce effects. That was suggested by the wording of article 21, paragraph 1, of the Vienna Conventions ("a reservation established with regard to another party in accordance with articles 19, 20 and 23"). Compliance with article 19 was *one* of the conditions for the validity of a reservation, but it was not the sole condition, and it therefore seemed that neither the permissibility school (which focused on article 19 to the exclusion of all other considerations) nor the opposability school (which was interested solely in article 20) provided an account of the legal regime of reservations in all its enormous complexity.

361. The freedom to formulate reservations being the basic principle, the Special Rapporteur had considered whether it might be useful to make the presumption of validity of reservations the subject of a separate draft guideline. However, he had decided not to in order to keep the Guide to Practice user-friendly. He had chosen to reproduce article 19 of the Vienna Convention of 1986 (because it included international organizations) in its entirety in draft guideline 3.1.[208]

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[208] The draft guideline reads as follows:

3.1 Freedom to formulate reservations

A State or an international organization may, at the time of signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(*a*) The reservation is prohibited by the treaty;

362. Although that solution was not ideal, given that article 19 was poorly drafted, he had thought it better to reproduce the article as it stood than to "correct" it.

363. Section B of the report dealt with reservations prohibited, either expressly or implicitly, by the treaty, which corresponded to article 19, subparagraphs (a) and (b), of the Vienna Conventions. It appeared from the *travaux préparatoires* for those Conventions that a treaty could prohibit *all* reservations or only *certain* reservations. The first case appeared simpler, although it was still necessary to decide whether or not a unilateral declaration constituted a reservation. However, that was a problem of the definition of reservations and not of validity.

364. The second case was more frequent: a treaty might prohibit reservations to specific provisions of the treaty or prohibit *categories* of reservations, which was much more complicated.

365. The three cases of prohibitions were covered by article 19, subparagraph (a), and that was exactly what was stated in draft guideline 3.1.1.[209]

366. Moreover, all those cases concerned reservations that were *expressly* prohibited and not *implicit* prohibitions. The latter category referred in particular to treaties concluded between a limited number of parties and the constituent instruments of international organizations (art. 20).

(*b*) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) In cases not falling under subparagraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty.

[209] The draft guideline reads as follows:

3.1.1 Reservations expressly prohibited by the treaty

A reservation is prohibited by the treaty if it contains a particular provision:

- Prohibiting all reservations;
- Prohibiting reservations to specified provisions;
- Prohibiting certain categories of reservations.

367. The term "specified reservations" was not as simple as it appeared. It nevertheless followed that reservations formulated by virtue of a reservation clause that did not specify what reservations were permitted were subject to the test of compatibility with the object and purpose of the treaty.

368. For all those reasons it was very important that the Commission should define the term "specified reservations" in draft guideline 3.1.2.[210]

369. He had tried to provide a definition that was neither too lax nor excessively strict, which would be tantamount to likening the notion to "negotiated reservations" (A/CN.4/508).

370. The Special Rapporteur recalled that the Commission had met with all the human rights treaty bodies with the exception of the Committee on the Elimination of Discrimination against Women, which was based in New York. He had proposed that a one- or two-day seminar should be organized on the subject of reservations to human rights treaties so that the Commission could review its preliminary conclusions of 1997.

371. Introducing the second part of his report (A/CN.4/558/Add.1), the Special Rapporteur explained that it dealt with reservations that were incompatible with the object and purpose of the treaty. That condition was an element of the flexible system stemming from the advisory opinion of the International Court of Justice of 1951 and the 1969 Vienna Convention. By virtue of that clarification, the right of States to make reservations was balanced by the requirement to preserve the "core contents" or raison d'être of the treaty. The criterion of compatibility with the object and purpose of the treaty applied only to reservations, as States were not required to justify their objections under article 20 of the Vienna Convention, even though they often did so. The compatibility of a reservation with the object and purpose of the treaty was a customary norm, although it was not a peremptory norm of international law. A reservation expressly prohibited by a treaty could not be considered valid on the pretext that it was compatible with

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[210] The draft guideline reads as follows:

3.1.2 Definition of specified reservations

For the purposes of guideline 3.1, the expression "specified reservations" means reservations that are expressly authorized by the treaty to specific provisions and which meet conditions specified by the treaty.

the object and purpose of the treaty. As they expressly authorized by the treaty, specified reservations were automatically valid and were not subject to the test of compatibility with the object and purpose of the treaty.

372. The same did not hold for two other cases, namely reservations that were implicitly authorized and those that were expressly authorized but not specified. In both cases, it was clear that a State or an international organization could formulate reservations that were not contrary to the object and purpose of the treaty. The *travaux préparatoires* for the Vienna Convention and case law (the 1977 ruling of the Arbitral Tribunal in the *Mer d'Iroise* case) seemed to substantiate that argument, which had first been set out insofar as implicitly authorized reservations were concerned by the Special Rapporteur on the law of treaties, Mr. Humphrey Waldock.[211] The two cases formed the subject of two separate draft guidelines, 3.1.3[212] and 3.1.4[213] respectively, which the Special Rapporteur preferred to the version consisting of a single draft guideline combining the two hypotheses.

373. The Special Rapporteur then took up the definition of the concept of the object and purpose of the treaty, which was one of the most sensitive issues of the law of treaties. That concept, which legal writers were virtually unanimous in qualifying as highly subjective, appeared not only in article 19 of the Vienna Conventions but in several other provisions of those instruments; clearly it had the same meaning throughout the Conventions.

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[211] A/CN.4/177, para. 4.

[212] The draft guideline reads as follows:

> **3.1.3 Reservations implicitly permitted by the treaty**
>
> Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is compatible with the object and purpose of the treaty.

[213] The draft guideline reads as follows:

> **3.1.4 Non-specified reservations authorized by the treaty**
>
> Where the treaty authorizes certain reservations without specifying them, a reservation may be formulated by a State or an international organization only if it is compatible with the object and purpose of the treaty.

374. That was why the competence of the interpreter of the concept had assumed great significance. The subjectivity of the notion was not, however, sufficient reason for abstaining from an effort to define it; other legal notions ("public morals", "reasonable", "good faith") were equally subjective or changed with time and did not pose insurmountable problems in their application.

375. In order to guide the (necessarily subjective) interpretation of the notion in good faith, the Special Rapporteur had endeavoured to rely on case law and doctrine without hoping to achieve absolute certainty. He believed that the object and purpose were one and the same notion and not two separate concepts; draft guideline 3.1.5[214] merely sought to provide a useful definition of the notion. It was a very general guideline, but he did not believe it was possible to go much further.

376. Draft guideline 3.1.6[215] sought to offset the general character of guideline 3.1.5 by suggesting a method for determining the object and purpose of the treaty, which was prompted by the principles applicable to the interpretation of treaties set out in articles 31 and 32 of the Vienna Conventions. In that connection, the Special Rapporteur believed that the object and

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[214] The draft guideline reads as follows:

3.1.5 Definition of the object and purpose of the treaty

For the purpose of assessing the validity of reservations, the object and purpose of the treaty means the essential provisions of the treaty, which constitute its raison d'être.

[215] The draft guideline reads as follows:

3.1.6 Determination of the object and purpose of the treaty

1. In order to determine the object and purpose of the treaty, the treaty as a whole must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context.

2. For that purpose, the context includes the preamble and annexes. Recourse may also be had in particular to the preparatory work of the treaty and the circumstances of its conclusion, and to the title of the treaty and, where appropriate, the articles that determine its basic structure [and the subsequent practice of the parties].

purpose of the treaty were not fixed at the time the treaty was concluded, and that the subsequent practice of the parties should therefore be borne in mind, although he was aware that there were views to the contrary.

377. As another way of addressing concerns about the general character of draft guidelines 3.1.5 and 3.1.6, the Special Rapporteur had proposed a large number of guidelines in the section of his report on application of the criterion.

378. The Special Rapporteur admitted that he was not claiming to have covered all possible cases or hypotheses, which was not in fact the purpose of codification; he had endeavoured to include the most useful cases, but the draft guidelines could always be supplemented if members of the Commission had other examples.

379. The situations considered were fairly heterogeneous but offered a representative sample of reservations. He was also aware that reservations could fall into several of the categories envisaged, in which case it would be necessary to combine the rules included in the draft guidelines.

380. Turning to the different categories of reservations, the Special Rapporteur recalled that dispute settlement clauses had been consistently found to be not contrary to the object and purpose of the treaty in the case law of the International Court of Justice. However, that view had not been shared by human rights treaty bodies,[216] which held that the rules for monitoring the implementation of the treaties constituted guarantees for securing the rights set forth in the treaties and were thus essential to their object and purpose.

381. Draft guideline 3.1.13[217] sought to reconcile the two apparently contrasting views.

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[216] Human Rights Committee, general comment No. 24 and Communication 845/1999, CCPR/C/21/Rev.1/Add.6, *Rawle Kennedy v. Trinidad and Tobago*; CCPR/C/69/D/845/1998, European Court of Human Rights, *Loizidou v. Turkey*, (Preliminary objections), ECHR 1996, Ser. A. vol. VI.

[217] The draft guideline reads as follows:

382. As to the problems associated with reservations to general human rights treaties, guideline 3.1.12[218] was sufficiently flexible to allow interpreters a degree of leeway.

383. A question that frequently arose, particularly in the field of human rights, concerned reservations formulated to safeguard the application of internal law. The answer to that question was much more nuanced than the categorical views expressed by some would imply: it seemed to the Special Rapporteur that it was impossible to deny a State the right to formulate a reservation in order to preserve the integrity of its internal law if the State did not undermine the object and purpose of the treaty. That was spelled out in draft guideline 3.1.11.[219]

3.1.13 Reservations to treaty clauses concerning dispute settlement or the monitoring of the implementation of the treaty

A reservation to a treaty clause concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:

(i) The provision to which the reservation relates constitutes the raison d'être of the treaty; or

(ii) The reservation has the effect of excluding its author from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that the author has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect.

[218] The draft guideline reads as follows:

3.1.12 Reservations to general human rights treaties

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account should be taken of the indivisibility of the rights set out therein, the importance that the right which is the subject of the reservation has within the general architecture of the treaty, and the seriousness of the impact the reservation has upon it.

[219] The draft guideline reads as follows:

3.1.11 Reservations relating to the application of domestic law

A reservation by which a State or an international organization purports to exclude or to modify the application of a provision of a treaty in order to preserve the integrity of its domestic law may be formulated only if it is not incompatible with the object and purpose of the treaty.

384. Reservations relating to the application of internal law must not be confused with vague and general reservations that by their very nature made it impossible for other States to understand or assess them. Indeed, such reservations were contrary to the object and purpose of the treaty, which was exactly what draft guideline 3.1.7[220] said.

385. The Special Rapporteur had begun his consideration of reservations relating to provisions embodying customary norms with the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases.[221] States made reservations to such provisions, in order to avoid the consequences of "conventionalization" of the customary rule. In addition, as practice showed, States also made reservations to codification treaties. Draft guideline 3.1.8[222] sought to enunciate the fundamental principles deriving from case law and practice in that regard.

386. The situation was different with reservations to provisions setting forth norms of *jus cogens* or non-derogable rules. The Special Rapporteur was convinced that such reservations were prohibited only if one acknowledged that *jus cogens* produced its effect outside the confines of articles 53 and 64 of the Vienna Conventions.

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[220] The draft guideline reads as follows:

3.1.7 Vague, general reservations

A reservation worded in vague, general language which does not allow its scope to be determined is incompatible with the object and purpose of the treaty.

[221] *I.C.J. Reports*, 1969, p. 3.

[222] The draft guideline reads as follows:

3.1.8 Reservations to a provision that sets forth a customary norm

1. The customary nature of a norm set forth in a treaty provision does not in itself constitute an obstacle to the formulation of a reservation to that provision.

2. A reservation to a treaty provision which sets forth a customary norm does not affect the binding nature of the customary norm in question in relations between the reserving State or international organization and other States or international organizations which are bound by that norm.

387. Consequently the invalidity of such reservations derived *mutatis mutandis* from the principle set forth in article 53 of the Vienna Convention. That was the sense of draft guideline 3.1.9.[223]

388. As to reservations to non-derogable rules, while such rules often set out principles of *jus cogens*, the Special Rapporteur proposed draft guideline 3.1.10,[224] which had been inspired by the practice of the human rights treaty bodies and the case law of the Inter-American Court of Human Rights.[225]

2. Summary of the debate

389. Several members praised the theoretical and practical importance of the tenth report, which was extremely detailed, analytical and rich.

390. It was noted that invalid reservations could not by definition achieve the result desired by the State that made them. At the same time, the invalidity of a reservation generally invalidated ratification of the treaty itself.

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[223] The draft guideline reads as follows:

3.1.9 Reservations to provisions setting forth a rule of *jus cogens*

A State or an international organization may not formulate a reservation to a treaty provision which sets forth a peremptory norm of general international law.

[224] The draft guideline reads as follows:

3.1.10 Reservations to provisions relating to non-derogable rights

A State or an international organization may formulate a reservation to a treaty provision relating to non-derogable rights provided that the reservation in question is not incompatible with the essential rights and obligations arising out of that provision. In assessing the compatibility of the reservation with the object and purpose of the provision in question, account must be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

[225] Advisory opinion of 8 September 1983 on *Restrictions to the death penalty*, Advisory Opinion OC-3/83, I.A.C.H.R. (Ser. A) No. 3 (1983).

391. It was also noted that the problems with terminology were not solely linguistic, given that the terms used had different meanings in different languages. In addition, some members were opposed to the use of the terms "permissible/impermissible", which were associated with the notion of responsibility. The term "validity" did not appear to be as neutral as it was claimed to be, but reflected a subjective value judgement that operated a posteriori and had to do with the existence or absence of legal consequences of the act in question and not with the process of completion or formulation. It was recalled in that connection that in the Sixth Committee several arguments had been put forward in opposition to the use of the term "validity" to qualify reservations. The terms "permissible/impermissible", meanwhile, managed to convey the sense the Commission wished to give to reservations at the current stage and were neutral, notwithstanding their association with a particular school of thought.

392. The view was also expressed that the question of *validity* was essential in the regime of reservations and constituted its basis in principle. However, the very definition of validity posed problems, especially with regard to what determined it. Since validity was a quality that determined compliance with the reference norm, namely the Vienna regime, it was obvious that the determination of validity occurred after the reservation was formulated, by other States or, where appropriate, by a judicial body. The variables inherent in validity also comprised the reference norm (the Vienna regime), the de facto situation (formulation of the reservation) and the possible reaction to the reservation, expressed either in the form of an objection or through a third body, judge or arbitrator. The question of validity was linked to a substantive problem, which was the limitations *ratione materiae* of the freedom to formulate reservations under article 19 of the Vienna Conventions.

393. It was also pointed out that the very concept of the validity of an act was one of the requirements for its "legality" or its "permissibility" and that it retained the necessary neutrality. Nevertheless some members wondered whether, given the significance of objections in assessing validity, it might be possible to contemplate including the draft guidelines on objections in the section of the Guide to Practice dealing with the validity of reservations.

394. The view was also expressed that the question of the validity of reservations should be considered together with the question of the legal consequences of invalid reservations. The question of the separability or inseparability of invalid reservations from the act expressing a State's consent to be bound to a treaty remained fundamental.

395. It was pointed out that as the term "validity" was essentially related to requisite *conditions*, the term "admissibility" might be more acceptable and less restrictive, because a reservation that was permitted or accepted was not necessarily valid.

396. Several members nevertheless expressed a preference for the terms "validity/invalidity".

397. It was pointed out that the meaning of the term "validity" included the quality of the elements of a legal order that had to meet all conditions as to form and substance required by that order for legal effects to be produced by an act. It was the conformity of the act with those conditions that made it possible to determine whether it was valid. That was why the Commission should not lose sight of those conditions and deal only with the legal effects of the act. From that standpoint the mere formulation of a reservation had nothing to do with its validity, which was determined after the prerequisite conditions had been met. Consequently, the words "and effects" should be deleted from draft guideline 1.6 with a view to its revision, given that validity was simply the ability of the reservation to produce effects.

398. Another point of view held that it was premature to take a decision at the current stage, before the effects of reservations had been considered, on the question of validity, which could have an impact on the international responsibility of States.

399. Other members, however, expressed doubts as to the use of the term "validity" in draft guidelines that had already been adopted.

400. With regard to draft guideline 3.1, it was noted that the title did not accurately reflect its content. It would seem justified to use the text of article 19 of the Vienna Convention of 1986 in order to indicate the conditions of validity. However, the fact that that provision reiterated the conditions *ratione temporis* that the formulation of a reservation must meet, and did so immediately after the section of the draft guidelines on procedure might seem somewhat strange. The concept of the presumption of validity of reservations seemed neither convincing nor useful to some members. It was pointed out that article 19 of the Vienna Conventions established, at the most, the presumption of freedom to formulate reservations which was substantially different from the presumption of validity of reservations.

401. Other members observed that the title of the draft guideline ought to read "The right to formulate reservations", for both linguistic and substantive reasons, since it sought to define a right that was nevertheless dependent on certain conditions established by the Vienna regime. According to another view, the title that might best correspond to the content of article 19 is "limits to freedom of the formulation of reservations".

402. As to draft guideline 3.1.1, it was noted that the term "expressly" in the title did not appear in the wording of article 19. It was rare, but not impossible, for treaties not to permit reservations by implication, as was the case, for example, with the Charter of the United Nations. The wording of the draft guideline should also be revised because the *chapeau* did not entirely correspond to the provisions that followed. Furthermore, if a treaty permitted only certain reservations, it was clear that other reservations were prohibited. It should also be made clear that if a treaty prohibited reservations to specific provisions or certain types of reservations, only those reservations were expressly prohibited. In order not to introduce a high degree of subjectivity, the Commission should limit itself to implicit prohibitions or authorizations that could logically and reasonably be deduced from the intention of the parties at the time they concluded the treaty. Others took the view that this guideline should be limited to express prohibitions.

403. It was further noted that it was difficult to establish every type of prohibited reservation with certainty. The case was also mentioned of a treaty prohibiting any reservations except those expressly authorized by it: it was felt that such a situation should be covered by the draft guidelines.

404. With regard to draft guideline 3.1.2, it was suggested that according to article 19 (b) of the Vienna Conventions, one needed to determine whether the treaty permitted *only* specific reservations and, if so, to determine whether or not a reservation that was formulated fell into that category. Questions were also raised as to the relevance of the term "authorized". The last part of the sentence in the English version, in any event, was not clear or seemed far too elliptic.

405. It was felt that the categories of prohibited reservations established by the Special Rapporteur was useful; however, in practice, which was rich and varied, it often proved difficult to distinguish among the different categories.

406. The view was expressed that in the case of a general authorization of reservations, the other parties could always object to them, and that also expressly authorized reservations were subject to the test of compatibility with the object and purpose of the treaty.

407. It would appear to be extremely difficult to distinguish implicitly prohibited reservations with certainty, as they were indeterminate by nature. They should be dealt with in a separate draft guideline.

408. Several members expressed their preference for two separate draft guidelines, 3.1.3 and 3.1.4.

409. With regard to draft guideline 3.1.4, the view was expressed that the Commission should opt for clearer wording affirming that reservations were subject to the criterion of compatibility with the object and purpose of the treaty if there was a general authorization or if the treaty did not contain any provisions on reservations.

410. Several members stressed the notion that the object and purpose of the treaty played a central role in the law of treaties as a whole. The Vienna Conventions were silent on the meaning of that notion. States expected the Commission to address that problem. The Special Rapporteur was commended for his efforts to define that nebulous and elusive concept. The object appeared to be the content of the treaty, while the purpose had to do with the end the treaty sought to achieve. Any reservation contrary to those two notions was not permitted.

411. While draft guideline 3.1.5 represented an attempt at clarification, the term "raison d'être" in the text provided little clarification. This term was also seen by others as too restrictive leading to the result that only very few reservations would be prohibited. It was suggested that in endeavouring to pinpoint the concept the terms object and purpose should not be separated. It was the object and purpose of the treaty that made it possible to say what the essential provisions of the treaty were, and not vice versa.

412. The view was also expressed in respect of both draft guidelines 3.1.5 and 3.1.13 that a reservation to a "secondary" provision that was linked to the raison d'être of the treaty could be equally risky. Distinguishing between the essential provisions of a treaty became a dangerous and random exercise.

413. Another point of view maintained that if determining the meaning of the notion of the object and purpose of the treaty was part of the interpretation of treaties, it could not be governed by pre-established definitions or rules. From that perspective it became very difficult to pinpoint notions such as "raison d'être" or "core content", which were equally vague, elusive or uncertain. Treaties expressed the intention of the States that had concluded them, and one could only conjecture as to the real meaning of that intention, as the advisory opinion of the International Court of Justice on reservations to the Convention against Genocide had made clear. The notion of the object and purpose of the treaty was determined subjectively by each State. Very often it was questionable whether a treaty had a specific object and purpose, since it was the outcome of a complex process of negotiations or exchanges. Accordingly, some members wondered whether a definition of that notion was possible or even necessary. In any event, it would be extremely difficult to define; there would always be a part that would remain a mystery.

414. As to the categories of examples of provisions cited by the Special Rapporteur, some members wondered what his criteria had been, given that the importance of such provisions varied from treaty to treaty, depending on the interests of the concluding States. Distinguishing human rights treaties was equally difficult, in part because of the difficulty in defining exactly what constituted such treaties and also because there were other categories of treaties that were also based on common interests.

415. It was pointed out that it might be useful to make express the rationales that the Special Rapporteur's examples sought to illustrate, namely cases where the reservation undermined either the legitimate expectations of the parties or the nature of the treaty as a common undertaking.

416. As to draft guideline 3.1.6, the view was expressed that articles 31 and 32 of the Vienna Conventions mentioned therein gave an important role of the object and purpose in the interpretation of the treaty. It was also pointed out that agreements relating to the treaty (art. 31, para. 2) or subsequent practice could be included. The Commission should not attempt to find a general rule for determining the object and purpose of the treaty, as the two concepts varied in accordance with the great diversity of treaties as well as with the necessarily subjective idea that the parties had of them.

417. Other members questioned the usefulness of draft guidelines 3.1.5 and 3.1.6.

418. It was pointed out that the Commission ought to approach the question covered in draft guideline 3.1.7 from the standpoint of procedure and ask whether a reservation drafted in vague and general terms could be said to intend to exclude or modify the legal effect of certain provisions of the treaty in their application to the reserving State. Attention was also drawn to the importance of context and specific circumstances.

419. Several members stressed the usefulness of draft guideline 3.1.8.

420. With regard to draft guideline 3.1.9, the view was expressed that there might be cases in which a reservation to a provision setting forth a rule of *jus cogens* was possible and not necessarily incompatible with the object and purpose of the treaty for reasons identical to those put forward in the case of customary rules (draft guideline 3.1.8). The prohibition of such reservations should be categorical only if the reserving State, by modifying the legal effect of such a provision, intended to introduce a rule that was contrary to *jus cogens*. The view was also expressed that the draft guideline was not really necessary because a reservation contrary to *jus cogens* would be automatically incompatible with the object and purpose of the treaty.

421. Several members stressed the usefulness of draft guideline 3.1.9.

422. Draft guideline 3.1.11 needed to be worded more precisely. The Commission should indicate that the reservation would be acceptable only if it was formulated in respect of a specific provision that was fundamental to internal law. It was even suggested that the draft guideline should be combined with draft guideline 3.1.7, given their similarity.

423. Several key provisions of draft guideline 3.1.12 were said to relate also to the exercise of protected rights. Moreover, the two criteria seemed to be too general to be really useful.

424. Draft guideline 3.1.13 was said to be more restrictive than article 19, subparagraph (c), of the Vienna Convention. It was also noted that the two cases mentioned (dispute settlement and monitoring of the implementation of the treaty) were sufficiently different and warranted two separate draft guidelines.

425. The proposal to hold a "seminar" was welcomed by several members. It was proposed that the seminar should focus in particular on the problem of the compatibility of reservations with the object and purpose of the treaty and, subsequently, on the role of human rights treaty bodies in determining compatibility.

426. Some members expressed a desire for the debate on the section of the report dealing with the compatibility of reservations with the object and purpose of the treaty to be continued during the fifty-eighth session (2006) and in the meantime reserved their position with respect to the issues raised by this section of the report.

3. Special Rapporteur's concluding remarks

427. At the conclusion of the debate, the Special Rapporteur expressed his satisfaction that so many of his draft guidelines had been favourably received in such a constructive manner by most members of the Commission. Referring to a few negative views based on theoretical positions, he recalled that the function of the exercise that the Commission had undertaken was not to create a work of doctrine in the abstract but rather to provide States with coherent answers to the whole range of questions they might raise with regard to reservations.

428. He observed that some of the criticisms that had been directed at him, however brilliant in theoretical terms, had not included concrete proposals for draft guidelines that could replace those that his critics would delete. The draft guidelines, together with the commentary thereto, still constituted the surest way to guide practitioners and States. In undertaking that useful pedagogical exercise, the Commission should not be guided by abstract considerations that had to do with the allegedly progressive or conservative character of proposals, but should instead adopt a pragmatic, moderate, "happy medium" attitude, while recalling that the Vienna Conventions, within the framework of which the exercise was taking place, were extremely flexible even if they tended to reflect a high degree of tolerance where reservations were concerned.

429. It was in that spirit that he had prepared the tenth report and proposed the 14 draft guidelines.

430. With regard to the question of validity, he was of the view that the Commission was dealing not only with a purely terminological question or a problem posed by the differences in the French and English languages. Having noted the relatively varied positions of members on that subject, he remained convinced that the Commission should not wait until it considered the effects of reservations to define their validity; he also believed that validity could not be assimilated to permissibility. In addition, given that validity was a question not only of substance but also of form, either the third section of the Guide to Practice should be preceded by a very general guideline that would specify that a reservation was considered to be valid if it fulfilled the conditions of substance and form established in the Vienna Conventions[226] and spelled out in the Guide to Practice, or else the title of the third part of the Guide should be modified. In his view, the French term "*validité*" applied both to conditions of form (dealt with in the second chapter of the Guide to Practice) and to those of substance, whereas draft guideline 3.1 as currently worded dealt only with the conditions of substance covered by article 19. Conversely, the English term "permissibility" (and not "admissibility") adequately defined the content of article 19. He therefore proposed that the "Validity of reservations" should be retained as the title of the third part of the Guide to Practice, on condition that the expression was understood to cover both conditions of form and conditions of substance, and that only the latter would be dealt with in that part of the Guide (with conditions of form dealt with in the second part); meanwhile, draft guideline 3.1 could be entitled "Permissibility of reservations" in English and "*Validité substantielle des reserves*" in French.

431. With regard to draft guidelines 1.6 and 2.1.8 (already adopted), the Commission could replace the word "permissibility" with "validity" in the former and the word "impermissible" with the word "invalid" in the latter. In the first paragraph of draft guideline 2.1.8, the first sentence would begin "When, in the opinion of the depositary, a reservation is manifestly invalid …", subject to an appropriate modification of the commentary.

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[226] Articles 21 (establishment), 19 (substance), 20 (opposition) and 23 (form) of the Vienna Convention.

432. Concerning draft guideline 3.1 and the observations made regarding its title, the Special Rapporteur agreed that it should be worded more clearly; that, however, was a drafting problem which the Drafting Committee could address.

433. He also thought that the wording of draft guideline 3.1.1 could be improved. However, he was not convinced that the possibility of implicitly prohibited reservations should be included, as such reservations had more to do with article 19, subparagraph (c) - in other words, they were invalid because they were incompatible with the object and purpose of the treaty, and not because they were implicitly prohibited.

434. He noted that draft guidelines 3.1.2, 3.1.3 and 3.1.4 had been generally endorsed, even though they would benefit from editorial improvements.

435. Accordingly, the Special Rapporteur proposed that the Commission should send draft guidelines 3.1, 3.1.1, 3.1.2, 3.1.3 and 3.1.4 to the Drafting Committee, together with draft guidelines 2.1.8 and 1.6 (already adopted), the latter two with a view to their amendment in the light of the terms selected.

436. The Special Rapporteur thought that the other draft guidelines contained in the tenth report should be considered again at the fifty-eighth session, given that the Commission had not been able to discuss them in depth for lack of time. He nevertheless was of the view that the Commission must absolutely define the notion of the "object and purpose" of the treaty (draft guidelines 3.1.5 and 3.1.6). The Special Rapporteur reiterated his desire to organize a meeting with the human rights treaty bodies during the fifty-eighth session, although he was aware of certain practical difficulties (not all bodies met at the same time) and budgetary constraints.

C. Text of draft guidelines on reservations to treaties provisionally adopted so far by the Commission

1. Text of draft guidelines

437. The text of the draft guidelines provisionally adopted so far by the Commission is reproduced below.

RESERVATIONS TO TREATIES

Guide to practice

Explanatory note[227]

Some draft guidelines in the present Guide to Practice are accompanied by model clauses. The adoption of these model clauses may have advantages in specific circumstances. The user should refer to the commentaries for an assessment of the circumstances appropriate for the use of a particular model clause.

1. Definitions

1.1 Definition of reservations[228]

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

1.1.1 [1.1.4][229] Object of reservations[230]

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.

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[227] For the commentary see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), p. 189.

[228] For the commentary to this draft guideline, see ibid., *Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196-199.

[229] The number between square brackets indicates the number of this draft guideline in the report of the Special Rapporteur or, as the case may be, the original number of a draft guideline in the report of the Special Rapporteur which has been merged with the final draft guideline.

[230] For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 210-217.

1.1.2 Instances in which reservations may be formulated[231]

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Conventions of 1969 and 1986 on the law of treaties.

1.1.3 [1.1.8] Reservations having territorial scope[232]

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

1.1.4 [1.1.3] Reservations formulated when notifying territorial application[233]

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

1.1.5 [1.1.6] Statements purporting to limit the obligations of their author[234]

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

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[231] For the commentary to this draft guideline, see ibid., *Fifty-third Session, Supplement No. 10* (A/53/10), pp. 204-206.

[232] For the commentary to this draft guideline, see ibid., pp. 206-209.

[233] For the commentary to this draft guideline, see ibid., pp. 209-210.

[234] For the commentary to this draft guideline, see ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 217-221.

1.1.6 Statements purporting to discharge an obligation by equivalent means[235]

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

1.1.7 [1.1.1] Reservations formulated jointly[236]

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

1.1.8 Reservations made under exclusionary clauses[237]

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

1.2 Definition of interpretative declarations[238]

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

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[235] For the commentary to this draft guideline, see ibid., pp. 222-223.

[236] For the commentary to this draft guideline, see ibid., *Fifty-third Session, Supplement No. 10* (A/53/10), pp. 210-213.

[237] For the commentary to this draft guideline, see ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 230-241.

[238] For the commentary to this draft guideline, see ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 223-240.

1.2.1 [1.2.4] Conditional interpretative declarations[239]

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

1.2.2 [1.2.1] Interpretative declarations formulated jointly[240]

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

1.3 Distinction between reservations and interpretative declarations[241]

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

1.3.1 Method of implementation of the distinction between reservations and interpretative declarations[242]

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

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[239] For the commentary to this draft guideline, see *ibid.*, pp. 240-249.

[240] For the commentary to this draft guideline, see *ibid.*, pp. 249-252.

[241] For the commentary to this draft guideline, see *ibid.*, pp. 252-253.

[242] For the commentary to this draft guideline, see *ibid.*, pp. 254-260.

1.1.2 [1.2.2] Phrasing and name[247]

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

1.1.3 [1.2.3] Formulation of a unilateral statement when a reservation is prohibited[248]

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

1.4 Unilateral statements other than reservations and interpretative declarations[249]

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations are outside the scope of the present Guide to Practice.

1.4.1 [1.1.5] Statements purporting to undertake unilateral commitments[250]

A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

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[247] For the commentary to this draft guideline, see *ibid.*, pp. 260-266.

[248] For the commentary to this draft guideline, see *ibid.*, pp. 266-268.

[249] For the commentary to this draft guideline, see *ibid.*, pp. 268-270.

[250] For the commentary to this draft guideline, see *ibid.*, pp. 270-273.

1.4.2 [1.1.6] Unilateral statements purporting to add further elements to a treaty[247]

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

1.4.3 [1.1.7] Statements of non-recognition[248]

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

1.4.4 [1.2.5] General statements of policy[249]

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

1.4.5 [1.2.6] Statements concerning modalities of implementation of a treaty at the internal level[250]

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other Contracting Parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

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[247] For the commentary to this draft guideline, see ibid., pp. 273-274.

[248] For the commentary to this draft guideline, see ibid., pp. 275-280.

[249] For the commentary to this draft guideline, see ibid., pp. 280-284.

[250] For the commentary to this draft guideline, see ibid., pp. 284-289.

1.4.6 [1.4.6, 1.4.7] Unilateral statements made under an optional clause[251]

A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

1.4.7 [1.4.8] Unilateral statements providing for a choice between the provisions of a treaty[252]

A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

1.5 Unilateral statements in respect of bilateral treaties[253]

1.5.1 [1.1.9] "Reservations" to bilateral treaties[254]

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

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[251] For the commentary to this draft guideline, see ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 241-247.

[252] For the commentary to this draft guideline, see ibid., pp. 247-252.

[253] For the commentary, see ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 289-290.

[254] For the commentary to this draft guideline, see ibid., pp. 290-302.

1.5.2 [1.2.7] Interpretative declarations in respect of bilateral treaties[255]

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

1.5.3 [1.2.8] Legal effect of acceptance of an interpretative declaration made in respect of bilateral treaty by the other party[256]

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

1.6 Scope of definitions[257]

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.

1.7 Alternatives to reservations and interpretative declarations[258]

1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] Alternatives to reservations[259]

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

– The insertion in the treaty of restrictive clauses purporting to limit its scope or application;

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[255] For the commentary to this draft guideline, see *ibid.*, pp. 302-306.

[256] For the commentary to this draft guideline, see *ibid.*, pp. 306-307.

[257] For the commentary to this draft guideline, see *ibid.*, pp. 308-310.

[258] For the commentary, see *ibid.*, *Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 252-253.

[259] For the commentary to this draft guideline, see *ibid.*, pp. 253-269.

– The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

1.7.2 [1.7.5] Alternatives to interpretative declarations[260]

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

– The insertion in the treaty of provisions purporting to interpret the same treaty;

– The conclusion of a supplementary agreement to the same end.

2. Procedure

2.0 Form and notification of reservations

2.0.1 Written form[261]

A reservation must be formulated in writing.

2.0.2 Form of formal confirmation[262]

Formal confirmation of a reservation must be made in writing.

2.1.5 Formulation of a reservation at the international level[263]

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

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[260] For the commentary to this draft guideline, see ibid., pp. 270-272.

[261] For the commentary to this draft guideline, see ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 63-67.

[262] For the commentary to this draft guideline, see ibid., pp. 67-69.

[263] For the commentary to this draft guideline, see ibid., pp. 69-75.

(a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:

(a) Heads of State, heads of Government and Ministers for Foreign Affairs;

(b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

(c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

(d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

2.1.4 [2.1.3 bis, 2.1.4] Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations[266]

The determination of the competent authority and the procedure to be followed at the internal level for formulating a reservation is a matter for the internal law of each State or relevant rules of each international organization.

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[266] For the commentary to this draft guideline, see *ibid.*, pp. 75-79.

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

2.1.5 Communication of reservations[265]

A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A reservation to a treaty in force which is the constituent instrument of an international organization or to a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.1.6 [2.1.6, 2.1.8] Procedure for communication of reservations[266]

Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon receipt by the State or by the organization to which it was transmitted, or as the case may be, upon its receipt by the depositary.

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[265] For the commentary to this draft guideline, see ibid., pp. 80-93.

[266] For the commentary to this draft guideline, see ibid., pp. 94-104.

The period during which an objection to a reservation may be raised starts at the date on which a State or an international organization received notification of the reservation.

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile.

2.1.7 Functions of depositaries[267]

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or

(b) Where appropriate, the competent organ of the international organization concerned.

2.1.8 [2.1.7 bis] Procedure in case of manifestly [impermissible] reservations[268]

Where, in the opinion of the depositary, a reservation is manifestly [impermissible], the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes such [impermissibility].

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[267] For the commentary to this draft guideline, see *ibid.*, pp. 105-112.

[268] For the commentary to this draft guideline, see *ibid.*, pp. 112-114.

If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.

2.2.1 Formal confirmation of reservations formulated when signing a treaty[269]

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

2.2.2 [2.2.3] Instances of non-requirement of confirmation of reservations formulated when signing a treaty[270]

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.

2.2.3 [2.2.4] Reservations formulated upon signature when a treaty expressly so provides[271]

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty ....[272]

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[269] For the commentary to this draft guideline, see *ibid.*, *Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 465-472.

[270] For the commentary to this draft guideline, see *ibid.*, pp. 472-474.

[271] For the commentary to this draft guideline, see *ibid.*, pp. 474-477.

[272] Section 2.3 proposed by the Special Rapporteur deals with the late formulation of reservations.

2.3.1 Late formulation of a reservation[273]

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.

2.3.2 Acceptance of late formulation of a reservation[274]

Unless the treaty provides otherwise or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

2.3.3 Objection to late formulation of a reservation[275]

If a Contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

2.3.4 Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations[276]

A Contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

(*a*) Interpretation of a reservation made earlier; or

(*b*) A unilateral statement made subsequently under an optional clause.

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[273] For the commentary to this draft guideline, see ibid., pp. 477-489.

[274] For the commentary to this draft guideline, see ibid., pp. 490-493.

[275] For the commentary to this draft guideline, see ibid., pp. 493-495.

[276] For the commentary to this draft guideline, see ibid., pp. 495-499.

2.3.5 Widening of the scope of a reservation[277]

The modification of an existing reservation for the purpose of widening its scope shall be subject to the rules applicable to the late formulation of a reservation. However, if an objection is made to that modification, the initial reservation remains unchanged.

2.4 Procedure for interpretative declarations[278]

2.4.1 Formulation of interpretative declarations[279]

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

[2.4.2 [2.4.1 bis] Formulation of an interpretative declaration at the internal level[280]

The determination of the competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration is a matter for the internal law of each State or relevant rules of each international organization.

A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]

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[277] For the commentary, see ibid., *Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 269-274.

[278] For the commentary, see ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10), p. 115.

[279] For the commentary to this draft guideline, see ibid., pp. 115-116.

[280] For the commentary to this draft guideline, see ibid., pp. 117-118.

2.4.3 Time at which an interpretative declaration may be formulated[281]

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7], and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.

2.4.4 [2.4.5] Non-requirement of confirmation of interpretative declarations made when signing a treaty[282]

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

2.4.5 [2.4.4] Formal confirmation of conditional interpretative declarations formulated when signing a treaty[283]

If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case the interpretative declaration shall be considered as having been made on the date of its confirmation.

2.4.6 [2.4.7] Late formulation of an interpretative declaration[284]

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other Contracting Parties objects to the late formulation of the interpretative declaration.

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[281] For the commentary to this draft guideline, see ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 499-501.

[282] For the commentary to this draft guideline, see ibid., pp. 501-502.

[283] For the commentary to this draft guideline, see ibid., pp. 502-503.

[284] For the commentary to this draft guideline, see ibid., pp. 503-505.

[2.4.7 [2.4.2, 2.4.9] Formulation and communication of conditional interpretative declarations[285]

A conditional interpretative declaration must be formulated in writing.

Formal confirmation of a conditional interpretative declaration must also be made in writing.

A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.]

2.4.8 Late formulation of a conditional interpretative declaration[286]

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the conditional interpretative declaration.

2.4.9 Modification of an interpretative declaration[287]

Unless the treaty provides that an interpretative declaration may be made or modified only at specified times, an interpretative declaration may be modified at any time.

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[285] For the commentary to this draft guideline, see ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 118-119.

[286] For the commentary to this draft guideline, see ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 505-506. This draft guideline (formerly 2.4.7 [2.4.8]) was renumbered as a result of the adoption of new draft guidelines at the fifty-fourth session.

[287] For the commentary see ibid., *Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 275-277.

2.4.10 Limitation and widening of the scope of a conditional interpretative declaration[288]

The limitation and the widening of the scope of a conditional interpretative declaration are governed by the rules respectively applicable to the partial withdrawal and the widening of the scope of reservations.

2.5 Withdrawal and modification of reservations and interpretative declarations

2.5.1 Withdrawal of reservations[289]

Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

2.5.2 Form of withdrawal[290]

The withdrawal of a reservation must be formulated in writing.

2.5.3 Periodic review of the usefulness of reservations[291]

States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

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[288] For the commentary, see ibid., pp. 277-278.

[289] For the commentary to this draft guideline, see ibid., *Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 190-201.

[290] For the commentary to this draft guideline, see ibid., pp. 201-207.

[291] For the commentary to this draft guideline, see ibid., pp. 207-209.

2.5.4 [2.5.5] Formulation of the withdrawal of a reservation at the international level[292]

1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made on behalf of a State or an international organization if:

(*a*) That person produces appropriate full powers for the purposes of that withdrawal; or

(*b*) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:

(*a*) Heads of State, heads of Government and Ministers for Foreign Affairs;

(*b*) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

(*c*) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization.

2.5.5 [2.5.5 bis, 2.5.5 ter] Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations[293]

The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or the relevant rules of each international organization.

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[292] For the commentary to this draft guideline, see ibid., pp. 210-218.

[293] For the commentary to this draft guideline, see ibid., pp. 219-221.

A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal.

2.5.6 Communication of withdrawal of a reservation[294]

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 [2.1.6, 2.1.8] and 2.1.7.

2.5.7 [2.5.7, 2.5.8] Effect of withdrawal of a reservation[295]

The withdrawal of a reservation entails the application as a whole of the provisions on which the reservation had been made in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

2.5.8 [2.5.9] Effective date of withdrawal of a reservation[296]

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

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[294] For the commentary to this draft guideline, see ibid., pp. 221-226.

[295] For the commentary to this draft guideline, see ibid., pp. 227-231.

[296] For the commentary to this draft guideline, see ibid., pp. 231-239.

Model clauses[297]

A. Deferment of the effective date of the withdrawal of a reservation

A Contracting Party which has made a reservation to this treaty may withdraw it by means of notification addressed to [the depositary]. The withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [the depositary].

B. Earlier effective date of withdrawal of a reservation[298]

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the depositary].

C. Freedom to set the effective date of withdrawal of a reservation[299]

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].

2.5.9 [2.5.10] Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation[300]

The withdrawal of a reservation takes effect on the date set by the withdrawing State or international organization where:

(*a*) That date is later than the date on which the other contracting States or international organizations received notification of it; or

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[297] For the commentary to this model clause, see ibid., p. 240.

[298] For the commentary to this model clause, see ibid., pp. 240-241.

[299] For the commentary to this model clause, see ibid., pp. 241-242.

[300] For the commentary to this draft guideline, see ibid., pp. 242-244.

(*b*) The withdrawal does not add to the rights of the withdrawing State or international organization, in relation to the other contracting States or international organizations.

2.5.10 [2.5.11] Partial withdrawal of a reservation[301]

The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization.

The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

2.5.11 [2.5.12] Effect of a partial withdrawal of a reservation[302]

The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent of the new formulation of the reservation. Any objection made to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

No objection may be made to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

2.5.12 Withdrawal of an interpretative declaration[303]

An interpretative declaration may be withdrawn at any time by the authorities competent for that purpose, following the same procedure applicable to its formulation.

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[301] For the commentary to this draft guideline, see ibid., pp. 244-256.

[302] For the commentary to this draft guideline, see ibid., pp. 256-259.

[303] For the commentary to this draft guideline, see ibid., *Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 279-280.

2.5.13 Withdrawal of a conditional interpretative declaration[304]

The withdrawal of a conditional interpretative declaration is governed by the rules applying to the withdrawal of reservations.

2.6.1 Definition of objections to reservations[305]

"Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.

2.6.2 Definition of objections to the late formulation or widening of the scope of a reservation[306]

"Objection" may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation or the widening of the scope of a reservation.

2. Text of the draft guidelines and commentaries thereto adopted by the Commission at its fifty-seventh session

438. The texts of draft guidelines with commentaries thereto adopted by the Commission at its fifty-seventh session are reproduced below.

2.6 Formulation of objections to reservations

Commentary

(1) Five provisions of the 1969 and 1986 Vienna Conventions are relevant to the formulation of objections to treaty reservations:

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[304] For the commentary to this draft guideline, see ibid., p. 280.

[305] For the commentary, see section C.2 below.

[306] For the commentary, see section C.2 below.

- Article 20, paragraph 4 (b), mentions "in passing" the potential authors of an objection;

- Article 20, paragraph 5, gives ambiguous indications as to the period in which an objection may be formulated;

- Article 21, paragraph 3, confirms the obligation imposed by article 20, paragraph 4 (b), on the author of an objection to state whether the latter therefore opposes the entry into force of the treaty between the author of the objection and the author of the reservation;

- Article 23, paragraph 1, requires that, like reservations themselves, objections be formulated in writing and communicated to the same States and international organizations as reservations; and

- Article 23, paragraph 3, states that an objection made previously to confirmation of a reservation does not itself require confirmation.

(2) Each of these provisions should be retained and, where necessary, clarified and supplemented in this section of the Guide to Practice, which should nevertheless give a preliminary definition of the word "objection", which is not defined in the Vienna Conventions - a gap that needs to be filled. This is the aim of draft guidelines 2.6.1 to 2.6.*x*.[307]

2.6.1 Definition of objections to reservations

"Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.

Commentary

(1) The aim of draft guideline 2.6.1 is to provide a generic definition applicable to all the categories of objections to reservations provided for in the 1969 and 1986 Vienna Conventions.

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[307] The Commission reserves the right to move these draft guidelines to chapter 1 ("Definitions") when it puts the "finishing touches" to the Guide to Practice.

For this purpose, the Commission has taken as a model the definition of reservations provided in article 2, paragraph 1 (d), of the Vienna Conventions and reproduced in guideline 1.1 of the Guide to Practice, adapting it to objections.

(2) This definition contains five elements:

- The first concerns the nature of the act ("a unilateral statement");
- The second concerns its name ("however phrased or named");
- The third concerns its author ("made by a State or an international organization");
- The fourth concerns when it should be made (when expressing consent to be bound[308]); and
- The fifth concerns its content or object, defined in relation to the objective pursued by the author of the reservation ("whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or international organization"[309]).

(3) However, the Commission considered that the definition of objections should not necessarily include all these elements, some of which are specific to reservations and some of which deserve to be further clarified for the purposes of the definition of objections.

(4) It appeared, in particular, that it would be better not to mention the moment when an objection can be formulated; the matter is not clearly resolved in the Vienna Conventions, and it would be preferable to examine it separately and seek to respond to it in a separate draft guideline.[310]

(5) Conversely, two of the elements in the definition of reservations should certainly be reproduced in the definition of objections, which, like reservations, are unilateral

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[308] See also draft guideline 1.1.2.

[309] See also draft guideline 1.1.1.

[310] The Commission proposes to examine this question at its next session.

statements whose wording or designation is unimportant if their object makes it possible to characterize them as objections.

(6) With regard to the first element, the provisions of the Vienna Conventions leave not the slightest doubt: an objection emanates from *a* State or *an* international organization and can be withdrawn at any time.[311] However, this does not resolve the very sensitive question of which categories of States or international organizations can formulate an objection.

(7) At this stage, the Commission does not consider it necessary to include in the definition the detail found in article 20, paragraph 4 (b), of the Vienna Convention of 1986, which refers to a "*contracting* State" and a "*contracting* international organization".[312] There are two reasons for this:

– On the one hand, article 20, paragraph 4 (b), settles the question of whether an objection has *effects* on the entry into force of the treaty between the author of the reservation and the author of the objection; however, it leaves open the question of whether it is possible for a State or an international organization that is not a contracting party in the meaning of article 2 (f) of the Convention to make an objection; the possibility that such a State or organization might formulate an objection cannot be ruled out, it being understood that the objection would not produce the effect provided for in article 20, paragraph 4 (b), until the State or organization has become a "contracting party". Moreover, article 21, paragraph 3, does not reproduce this detail and refers only to "a State or an international organization objecting to a reservation", without further elaboration; this aspect deserves to be studied separately;

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[311] Cf. article 20, para. 4 (b), article 21, para. 3, and article 22, paras. 2 and 3 (b). On this subject, see: Roberto Baratta, *Gli effetti delle riserve ai trattati* (Milan, Giuffrè, 1999), p. 341, or Renata Szafarz, "Reservations to multilateral treaties", *5 Polish Yearbook of International Law* 1970, p. 313. It does not follow, however, that, like a reservation, an objection cannot be formulated jointly by several States or international organizations. This possibility will be considered at a later date.

[312] Article 20, para. 4 (b), of the Vienna Convention of 1969 speaks only of the "contracting State".

– On the other hand, the definition of reservations itself gives no information about the status of a State or an international organization that is empowered to formulate a reservation; it would not seem helpful to make the definition of objections more cumbersome by proceeding differently.

(8) With regard to the second element, it is sufficient to recall that the law of treaties, as enshrined in the 1969 Vienna Convention, is wholly permeated by the notion that the intentions of States take precedence over the terminology which they use to express them. This is apparent from the definition given in the Convention of the term "treaty",[313] which "means an international agreement ... whatever its particular designation".[314] Likewise, a reservation is defined therein as "a unilateral statement, however phrased or named",[315] and the Commission used the same term to define interpretative declarations.[316] The same should apply to objections: here again, it is the intention which counts. The question remains, however, as to what this intention is: this problem is at the heart of definition proposed in draft guideline 2.6.1.

(9) At first sight, the word "objection" has nothing mysterious about it. In its common meaning, it designates a "reason which one opposes to a statement in order to counter it".[317] From a legal perspective, it means, according to the *Dictionnaire de droit international public*, the "opposition expressed by a subject of law to an act or a claim by another subject of law in

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[313] The appropriateness of describing a single word as a "term" may be questionable, but as this terminological inflection is enshrined in custom it does not seem advisable to question it.

[314] Article 2, para. 1 (a). See also, for example, the Judgment of 1 July 1994 of the International Court of Justice in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, I.C.J. Reports*, 1994, p. 112 at p. 120, para. 3: "... international agreements may take a number of forms and be given a diversity of names".

[315] Article 2, para. 1 (d).

[316] See draft guideline 1.2 and the commentary thereon in *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10) (in particular, paras. (14) and (15)), pp. 230-235, and the examples of "renaming" (ibid., and in the commentary on draft guideline 1.3.2, "Phrasing and name", ibid., pp. 260-266).

[317] *Grand Larousse encyclopédique*, 15 vols. (Paris : La Rousse).

order to prevent its entry into force or its opposability to the first subject".[318] The same work defines "objection to a reservation" as follows: "Expression of rejection by a State of a reservation to a treaty formulated by another State, where the aim of the reservation is to oppose the applicability between the two States of the provision or provisions covered by the reservation, or, if such is the intention stated by the author of the objection, to prevent the entry into force of the treaty as between those two States".[319]

(10) This latter clarification has its basis in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions, which envisages that the author of the objection may indicate whether it opposes the entry into force of the treaty between it and the author of the reservation. This possibility is reflected in the last phrase of the definition in draft guideline 2.6.1, according to which, in making an objection, the author may seek to "exclude the application of the treaty as a whole, in relations with the reserving State or organization". In such a case, the intention of the author of the unilateral statement to object to the reservation is in no doubt.

(11) This might not be true of all categories of reactions to a reservation, which might show misgivings on the part of their authors without amounting to an objection as such.

(12) As the court of arbitration which settled the dispute between France and the United Kingdom concerning the delimitation of the continental shelf in the *Mer d'Iroise* case stated in its decision of 30 June 1977:

> "Whether any such reaction amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned."[320]

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[318] Jean Salmon, ed., Dictionnaire de droit international public (Brussels: Bruylant/AUF, 2001), p. 763.

[319] Ibid., p. 764. It need hardly be stated that this definition applies also to an objection formulated by an international organization.

[320] Case concerning the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic, *U.N.R.I.A.A.*, vol. XVIII, p. 3 at pp. 32-33, para. 39.

In this case, the court did not expressly take a position on the nature of the United Kingdom's "reaction", but it "acted as if it were an objection",[321] namely, by applying the rule laid down in article 21, paragraph 3, of the 1969 Vienna Convention, which, however, was not in force between the parties.

(13) The award has been criticized in that regard,[322] but it appears indisputable that the wording of the British statement in question clearly reflects the intention of the United Kingdom to object to the French reservation. The statement reads as follows:

> "The Government of the United Kingdom are unable to accept reservation (b)."[323]

The refusal to accept a reservation is precisely the purpose of an objection in the full sense of the word in its ordinary meaning.

(14) As the French-British court of arbitration noted, it can happen that a reaction to a reservation, even if critical of it, does not constitute an objection in the sense of articles 20 to 23 of the Vienna Conventions. The reaction may simply consist of observations, in which a State or an international organization announces its (restrictive) interpretation of the reservation or the conditions under which it considers it to be valid. For example, "in 1979, the United Kingdom, Germany and France reacted to the reservation made by Portugal to the protection of property rights contained in Article 1 of the Protocol to the ECHR [European Convention on Human Rights]. By making this reservation, Portugal intended to exclude the sweeping expropriation and nationalization measures, which had been adopted in the wake of the Carnations Revolution, from any challenge before the European Commission and Court of Human Rights. The reacting States did not formally object to the reservation made by Portugal, but rather made declarations to the effect that it could not affect the general principles of

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[321] Pierre-Henri Imbert, "La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande Bretagne et d'Irlande du Nord", *AFDI* 1978, p. 29 at p. 45.

[322] Ibid.

[323] See award, *U.N.R.I.A.A.*, vol. XVIII, p. 162, para. 40.

international law which required the payment of prompt, adequate and effective compensation in respect of the expropriation of foreign property. Following constitutional and legislative amendments, Portugal withdrew this reservation in 1987".[324]

(15) The following examples can be interpreted in the same way:

– The communications whereby a number of States indicated that they did not regard "the statements[325] concerning paragraph (1) of article 11 [of the 1961 Vienna Convention on Diplomatic Relations] made by the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics and the Mongolian People's Republic as modifying any rights or obligations under that paragraph";[326] the communications could be seen as interpretations of the statements in question (or of the provision to which they relate) rather than as true objections, particularly in contrast with other statements formally presented as objections;[327]

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[324] Jörg Polakiewicz, *Treaty-Making in the Council of Europe* (Strasbourg: Council of Europe Publishing, 1999), p. 106; footnotes omitted.

[325] These statements, in which the parties concerned explained that they consider "that any difference of opinion regarding the size of a diplomatic mission should be settled by agreement between the sending State and the receiving State", they expressly termed "reservations" (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2004*, ST/LEG/SER.E/23, United Nations publication, Sales No. E.05.V.3 (hereinafter *Multilateral Treaties ...*)), vol. I, chap. III.3, pp. 90-92.

[326] Ibid., p. 93 (Australia); see also pp. 93-94 (Canada), p. 94 (Denmark), p. 94 (France), p. 95 (Malta), p. 96 (New Zealand) and p. 97 (Thailand, United Kingdom).

[327] Ibid., statements by Greece (p. 95), Luxembourg (p. 95) and the Netherlands (pp. 95-96), or the United Republic of Tanzania (p. 97) or the more ambiguous statement by Belgium (p. 93). See also, for example, the last paragraph of the communication of the United Kingdom concerning the reservations and declarations accompanying the instrument of ratification deposited by the Union of Soviet Socialist Republics to the *1969 Vienna Convention on the Law of Treaties* (ibid., vol. II, chap. XXIII.1, p. 360) or the reaction of Norway to the corrective "declaration" of France dated 11 August 1982 regarding the *1978 Protocol to the International Convention for the Prevention of Pollution from Ships* (MARPOL) (a declaration that clearly appears to be a reservation and to which Sweden and Italy had objected as such) stating that

– The communication of the United States of America regarding the first reservation of Colombia to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988, in which the United States Government says that it understands the reservation "to exempt Colombia from the obligations imposed by article 3, paragraphs 6 and 9, and article 6 of the Convention only insofar as compliance with such obligations would prevent Colombia from abiding by article 35 of its Political Constitution (regarding the extradition of Colombian nationals by birth), *to the extent that the reservation is intended to apply* other than to the extradition of Colombian nationals by birth, the Government of the United States *objects to the reservation*";[328] this is an example of a "conditional acceptance" rather than an objection strictly speaking; or

– The communications of the United Kingdom, Norway and Greece concerning the declaration of Cambodia on the Convention on the International Maritime Organization.[329]

(16) Such "quasi-objections" have tended to proliferate in recent years with the growth of the practice of the "reservations dialogue". What the dialogue entails is that States (for the most part European States) inform the reserving State of the reasons why they think the reservation should be withdrawn, clarified or modified. Such communications may be true objections, but they may - and often do - open a dialogue that might indeed lead to an objection, although it might also result in the modification or withdrawal of the reservation. The reaction of Finland to the reservations made by Malaysia on its accession to the Convention on the Rights of the Child of 1989 clearly falls into the first category and undoubtedly constitutes an objection:

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it considered it to be a declaration and not a reservation (*Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions*, J/7772, p. 81, note 1).

[328] *Multilateral Treaties* ..., vol. I, chap. VI.19, p. 450; italics added. Colombia subsequently withdrew the reservation (ibid., p. 451, note 11).

[329] Ibid., vol. II, chap. XII.1, p. 9, note 12.

"In its present formulation the reservation is clearly incompatible with the object and purpose of the Convention and therefore inadmissible under article 51, paragraph 2, of the [said Convention]. Therefore the Government of Finland *objects to such reservation.* The Government of Finland further notes that the reservation made by the Government of Malaysia is devoid of legal effect."[330]

(17) Whether or not the reaction of Austria to the same reservations, a reaction also thoroughly reasoned and directed toward the same purpose, can be considered an objection is more debatable; Austria's statement of 18 June 1996 contains no language expressive of a definitive rejection of the reservations of Malaysia and suggests instead a waiting stance:

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[330] Ibid., vol. I, chap. IV.II, pp. 318 - italics added. The full text of this objection reads as follows:

> "The reservation made by Malaysia covers several central provisions of the [said Convention]. The broad nature of the said reservation leaves open to what extent Malaysia commits itself to the Convention and to the fulfilment of its obligations under the Convention. In the view of the Government of Finland reservations of such comprehensive nature may contribute to undermining the basis of international human rights treaties.
>
> "The Government of Finland also recalls that the said reservation is subject to the general principle of the observance of the treaties according to which a party may not invoke its internal law, much less its national policies, as justification for its failure to perform its treaty obligations. It is in the common interest of the States that contracting parties to international treaties are prepared to undertake the necessary legislative changes in order to fulfil the object and purpose of the treaty. Moreover, the internal legislation as well as the national policies are also subject to changes which might further expand the unknown effects of the reservation.
>
> "In its present formulation the reservation is clearly incompatible with the object and purpose of the Convention and therefore inadmissible under article 51, paragraph 2, of the [said Convention]. Therefore the Government of Finland *objects to such reservation.* The Government of Finland further notes that the reservation made by the Government of Malaysia is devoid of legal effect.
>
> "The Government of Finland recommends the Government of Malaysia to reconsider its reservation to the [said Convention]."

For even clearer objections to the reservations of Malaysia, see the statements of Germany, Ireland, the Netherlands, Norway, Portugal and Sweden and the communications of Belgium and Denmark (ibid., pp. 317-322). Malaysia subsequently withdrew part of its reservations (see ibid., note 27).

"Under article 19 of the Vienna Convention on the Law of Treaties, which is reflected in article 51 of the [Convention on the Rights of the Child], a reservation, in order to be admissible under international law, has to be compatible with the object and purpose of the treaty concerned. A reservation is incompatible with the object and purpose of a treaty if it intends to derogate from provisions the implementation of which is essential to fulfilling its object and purpose.

"The Government of Austria has examined the reservation made by Malaysia to the [Convention]. Given the general character of these reservations *a final assessment as to its admissibility under international law cannot be made without further clarification.*

"Until the scope of the legal effects of this reservation is sufficiently specified by Malaysia, the Republic of Austria considers these reservations as not affecting any provision the implementation of which is essential to fulfilling the object and purpose of the [Convention].

"Austria, however, objects to the admissibility of the reservations in question *if* the application of this reservation negatively affects the compliance of Malaysia ... with its obligations under the [Convention] essential for the fulfilment of its object and purpose.

"Austria could not consider the reservation made by Malaysia ... as admissible under the regime of article 51 of the [Convention] and article 19 of the Vienna Convention on the Law of Treaties *unless* Malaysia ..., *by providing additional information or through subsequent practice*, ensure[s] that the reservations are compatible with the provisions essential for the implementation of the object and purpose of the [Convention]."[331]

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[331] Ibid., pp. 317-318 - italics added. See also the reaction of Sweden to Canada's reservation to the *Espoo Convention of 25 February 1991*, ibid., vol. II, chap. XXVII.4, p. 468.

Here again, rather than a straightforward objection, the statement can be considered a conditional acceptance (or conditional objection) with a clear intent (to induce the reserving State to withdraw or modify its reservation) but with uncertain legal status and effects, if only because the conditions for accepting or rejecting the reservation are not susceptible to an objective analysis and no particular time limit is set.

(18) Such statements pose problems comparable to those raised by communications in which a State or an international organization "reserves its position" regarding the validity of a reservation made by another party, particularly with regard to its validity *ratione temporis*. For example, there is some doubt as to the scope of the statement of the Netherlands to the effect that the Government of the Netherlands "reserves all rights regarding the reservations made by the Government of Venezuela on ratifying [the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone] in respect of article 12 and article 24, paragraphs 2 and 3".[332] The same could be said of the statement of the United Kingdom to the effect that it was "not however able to take a position on [the] purported reservations [of the Republic of Korea to the International Covenant on Civil and Political Rights] in the absence of a sufficient indication of their intended effect, in accordance with the terms of the Vienna Convention on the Law of Treaties and the practice of the Parties to the Covenant. Pending receipt of such indication, the Government of the United Kingdom reserve their rights under the Covenant in their entirety".[333] Similarly, the nature of the reactions of several States[334] to the limitations that Turkey had set on its acceptance

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[332] *Multilateral Treaties* ..., vol. II, chap. XXI.1, pp. 268-269. See also the examples given by Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (The Hague: T.M.C. Asser Institute, 1986), pp. 318 and 336 (Canada's reaction to France's reservations and declarations to the Convention on the Continental Shelf).

[333] *Multilateral Treaties* ..., vol. I, chap. IV.4, p. 192. See also the communication of the Netherlands concerning the Australian reservations to article 10 of the Covenant (ibid., p. 189); on the other hand, the reaction of the Netherlands to the Australian reservations to articles 2 and 50 of the Covenant has more the appearance of an interpretation of the reservations in question (ibid., p. 189).

[334] Belgium, Denmark, Luxembourg, Norway and Sweden. Such limitations do not constitute reservations within the meaning of the Guide to Practice (cf. the second paragraph of draft guideline 1.4.6), but the example (given by Polakiewicz, supra, note 324, p. 107) is nonetheless striking by analogy.

of the right of individual petition under former article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe is not easy to determine. These States, using a number of different formulas, communicated to the Secretary-General of the Council of Europe that they reserved their position pending a decision by the competent organs of the Convention, explaining that "the absence of a formal and official reaction on the merits of the problem should not ... be interpreted as a tacit recognition ... of the Turkish Government's reservations".[335] It is hard to see these as objections; rather, they are notifications of provisional "non-acceptance" associated with a waiting stance. In contrast, an objection involves taking a formal position seeking to prevent the reservation from having the effects intended by its author.

(19) It does not follow that reactions, of the type as those mentioned above,[336] which the other parties to the treaty may have with respect to the reservations formulated by a State or an international organization, are prohibited or even that they produce no legal effects. However, such reactions are not objections within the meaning of the Vienna Conventions and their effects relate to the interpretation of the treaty or the unilateral acts constituted by the reservations, or else they form part of the "reservations dialogue" that the other parties to the treaty try to start up with the author of the reservation. These uncertainties clearly illustrate the value of using precise and unambiguous terminology in the description of reactions to a reservation, in the wording and in the definition of the scope which the author of an objection intends to give to it.[337]

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[335] Statement of Luxembourg. The text of these different statements is reproduced in the judgement of 23 March 1995 of the European Court of Human Rights in the case of *Loizidou v. Turkey (Preliminary Objections)* ECHR Ser. A, vol. 310, p. 7 at pp. 12-13, paras. 18-24.

[336] Commentary to the present guideline, paras. (13)-(17).

[337] See in this respect the "Model response clauses to reservations" appended to Recommendation No. R (99) 13 adopted on 18 May 1999 by the Committee of Ministers of the Council of Europe. It should be noted that all the alternative wordings proposed in that document expressly utilize the word "objection". On the disadvantages of vague and imprecise objections, see Horn, supra, note 332, pp. 184-185; see also pp. 191-197 and 221-222.

(20) As to the first point - the description of the reaction - the most prudent solution is certainly to use the noun "objection" or the verb "object". Such other terms as "opposition/oppose",[338] "rejection/reject",[339] and "refusal/refuse" must also, however, be regarded as signifying objection. Unless a special context demands otherwise, the same is true of expressions like "the Government of ... does not accept the reservation ..."[340] or "the reservation formulated by ... is impermissible/unacceptable/inadmissible".[341] Such is also the case when a State or an international organization, without drawing any express inference, states that a reservation is "prohibited by the treaty",[342] "entirely void"[343] or simply "incompatible with the object and purpose"[344] of the treaty, which is extremely frequent. In these last cases, this conclusion is the only one possible given the provisions of article 19 of the 1969 and

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[338] See also the objection of Finland to the reservation by Malaysia to the Convention on the Rights of the Child, para. (16) above.

[339] See, for example, the objection of Guatemala to the reservations of Cuba to the *Vienna Convention on Diplomatic Relations of 1961* (*Multilateral Treaties* ..., vol. I, chap. III.3, p. 95).

[340] See, for example, the objections of the Australian Government to various reservations to the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (*Multilateral Treaties* ..., vol. I, chap. IV.1, p. 129) and of the Government of the Netherlands to numerous reservations to the *Convention on the High Seas of 1958* (ibid., vol. II, chap. XXI.2, p. 275). See also the British objection to French reservation (b) to article 6 of the Geneva Convention on the Continental Shelf, para. (13) above.

[341] See, for example, the reaction of Japan to reservations made to the Convention on the High Seas of 1958 (*Multilateral Treaties* ..., vol. II, chap. XXI.2, p. 275) or that of Germany to the Guatemalan reservation to the *Convention relating to the Status of Refugees* of 1951 (ibid., vol. I, chap. V.2, pp. 368-369).

[342] See, for example, all the communications relating to the declarations made under article 310 of the *United Nations Convention on the Law of the Sea of 1982* (*Multilateral Treaties* ... vol. II, chap. XXI.6, pp. 312-314).

[343] See, for example, the reactions of the European Community to the declarations of Bulgaria and the German Democratic Republic regarding the *TIR Convention of 1975* (ibid., vol. I, chap. XI A.16, p. 598).

[344] See, for example, the statement by Portugal concerning the reservations of Maldives to the *Convention on the Elimination of All Forms of Discrimination against Women of 1979* (ibid., vol. I, chap. IV.8, p. 263) and that by Belgium concerning the reservations of Singapore to the *Convention on the Rights of the Child of 1989* (ibid., vol. I, chap. IV.11, p. 318).

1986 Vienna Conventions: in such cases, a reservation cannot be formulated and, when a contracting party expressly indicates that this is the situation, it would be inconceivable that it would not object to the reservation.

(21) The fact remains that in some cases States intend their objections to produce effects other than those expressly provided for in article 21, paragraph 3, of the Vienna Conventions. The question that then arises is whether, strictly speaking, these can be called objections.

(22) This provision envisages only two possibilities:

- Either "the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation", which is the "minimum" effect of an objection;

- Or, if the State or international organization formulating an objection to a reservation clearly states that such is its intention, in accordance with the provisions of article 20, paragraph 4 (b), the treaty does not enter into force between itself and the reserving State or organization; this is generally known as the "maximum" effect of an objection.[345]

(23) However, there is in practice an intermediate stage between the "minimum" and "maximum" effects of the objection, as envisaged by this provision, since there are situations in which a State wishes to enter into treaty relations with the author of the reservation while at the same time considering that the effect of the objection should go beyond what is provided for in article 21, paragraph 3.[346]

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[345] Rosa Riquelme Cortado, *Las Reservas a los Tratados: Lagunas y Ambigüedades del Régimen de Viena* (Universidad de Murcia, 2004), pp. 279-280; Horn, supra, note 332, pp. 170-172.

[346] See, for example, Canada's objection to Syria's reservation to the 1969 Vienna Convention: " ... Canada does not consider itself in treaty relations with the Syrian Arab Republic in respect of those provisions of the Vienna Convention on the Law of Treaties to which the compulsory conciliation procedures set out in the annex to that Convention are applicable" (*Multilateral Treaties* ..., vol. II, chap. XXIII.1, p. 356). For other examples and for a discussion of the permissibility of this practice, see below. See also Richard W. Edwards, Jr., "Reservations to Treaties", *10 Michigan Journal of International Law*, 1989, p. 400.

(24) Similarly, the objecting State may intend to produce what is described as a "super-maximum" effect,[347] consisting in the determination not only that the reservation objected to is not valid but also that, as a result, the treaty as a whole applies ipso facto in the relations between the two States. This was the case, for example, with Sweden's objection of 27 November 2002 to the reservation which Qatar made when acceding to the Optional Protocol of 25 May 2000 to the Convention on the Rights of the Child:

> "This objection shall not preclude the entry into force of the Convention between Qatar and Sweden. The Convention enters into force in its entirety between the two States, without Qatar benefiting from its reservation."[348]

(25) The Commission is aware that the validity of such objections has been questioned.[349] However, it sees no need to take a position on this point for the purpose of defining objections: the fact is that the authors *intend* their objection to produce such effects, intermediate or "super-maximum" effect, and this is all that matters at this stage. Just as the definition of reservations does not prejudge their validity,[350] so, in stating in draft guideline 2.6.1 that, by

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[347] See Bruno Simma, "Reservations to human rights treaties - some recent developments", in Gerhard Hafner (ed.), *Liber Amicorum, Professor Ignaz Seidl-Hohenveldern: In Honour of His 80th Birthday* (The Hague: Kluwer, 1998), p. 659 at pp. 667-668. Riquelme Cortado, supra, note 345, pp. 300-305.

[348] *Multilateral Treaties* ..., vol. I, chap. IV.11.C, p. 348; see also Norway's objection of 30 December 2002 (ibid., p. 348).

[349] The argument for their validity can be based on the position adopted by the organs of the *European Convention on Human Rights* and general comment No. 24 of the Human Rights Committee (CCPR/C/21/Rev.1/Add.6, 11 November 1994), but is hardly compatible with paragraph 10 of the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights, adopted in 1997 (see *Yearbook ... 1997*, vol. II, Part Two, p. 57, para. 157) or with the principle *par in parem non habet juridictionem*. "To attribute such an effect to the rejection of the reservations is not easy to reconcile with the principle of mutuality of consent in the conclusion of treaties" (arbitral award of 30 June 1977 in the *Mer d'Iroise* case, *U.N.R.I.A.A.*, vol. XVIII, p. 42, para. 60).

[350] Cf. draft guideline 1.6 ("Scope of definitions"): "The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them" (see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 308-310).

objecting, the "State or organization purports to exclude or to modify the legal effects of the reservation", the Commission has endeavoured to take a completely neutral position with regard to the validity of the effects that the author of the objection intends its objection to produce. This is a matter to be taken up in the consideration of the effects of objections.

(26) This being so, despite the contrary opinion of some writers,[351] no rule of international law requires a State or an international organization to state its reasons for an objection to a reservation. Except where a specific reservation is expressly authorized by a treaty,[352] the other contracting parties are always free to reject it and even not to enter into treaty relations with its author. A statement drafted as follows:

> "The Government ... intends to formulate an objection to the reservation made by ... "[353]

is as valid and legally sound as a statement setting forth a lengthy argument.[354] There is, however, a recent but unmistakable tendency to specify and explain the reasons justifying the objection in the eyes of the author, and the Commission envisages adopting a guideline that encourages States to do so.

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[351] Liesbeth Lijnzaad (*Reservations to UN-Human Rights Treaties - Ratify and Ruin?*, Nijhoff, Dordrecht, 1994, p. 45) cites in this respect R. Kühner, *Vorbehalte zu multilateralen völkerrechtlichen Vertrage* (Berlin: 1986), p. 183 and Szafarz, supra, note 311, p. 309; where the last-mentioned author is concerned, this does not, however, appear to be her true position. Practice demonstrates that States do not feel bound to state the reasons on which their objections are based; see, inter alia, Horn, supra, note 332, p. 131 and pp. 209-219.

[352] See in this respect the arbitral award of 30 June 1977 in the *Mer d'Iroise* case: "Only if the Article had authorised the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance" (*U.N.R.I.A.A.*, vol. XVIII, p. 32, para. 39). Pierre-Henri Imbert even thinks that an expressly authorized reservation can be objected to (*Les réserves aux traités multilatéraux* (Paris: Pedone, 1979), pp. 151-152).

[353] Among the many examples, see the statement by Australia concerning the reservation of Mexico to the *Convention on the High Seas of 1958* (*Multilateral Treaties ...*, vol. II, chap. XXI.2, p. 274) and those by Belgium, Finland, Italy, Norway and the United Kingdom with respect to the *International Convention on the Elimination of All Forms of Racial Discrimination of 1966* (ibid., vol. I, chap. IV.2, pp. 144-149).

[354] For an example, see supra, note 330 above.

(27) The Commission should also point out that it is aware that the word "made", in the third clause of the proposed definition ("a unilateral statement ... *made* by a State or an international organization") is open to discussion: taken literally, it might be understood as meaning that the objection produces effects per se without any other condition having to be met; yet objections, like reservations, must be permissible. The word "made" was chosen for reasons of symmetry, because it appears in the definition of reservations. On the other hand, it seemed preferable to the Commission to indicate that the objection was made "in response to a reservation to a treaty *formulated* by another State or international organization", as a reservation only produces effects if it is "established with regard to another party in accordance with articles 19, 20 and 23".[355]

2.6.2 Definition of objections to the late formulation or widening of the scope of a reservation

"Objection" may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation or the widening of the scope of a reservation.

Commentary

(1) Under draft guidelines 2.3.1 to 2.3.3, the contracting parties may also "object" not only to the reservation itself but also to the late formulation of a reservation.

(2) In its commentary on draft guideline 2.3.1, the Commission wondered whether it was appropriate to use the word "objects" to reflect the second hypothesis and noted that, given the possibility for a State to accept the late formulation of a reservation but object to its content, some members "wondered whether it was appropriate to use the word 'objects' in draft guideline 2.3.1 to refer to the opposition of a State not to the planned reservation, but to its late formulation. Nevertheless, most members took the view that it was inadvisable to introduce the distinction formally, since in practice the two operations are indistinguishable".[356]

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[355] Article 21, para. 1.

[356] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 489, para. (23), of the commentary on draft guideline 2.3.1.

(3) However, while it is true that there appears to be no precedent in which a State or an international organization, without objecting to the late formulation of a reservation, nevertheless objected to it, this hypothesis cannot be excluded. Guideline 2.6.2 draws attention to this distinction.

(4) The members of the Commission who had expressed their opposition to the inclusion of the practice of the late formulation of reservations in the Guide to Practice[357] reiterated their opposition to its inclusion.

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[357] Ibid., p. 478, para. (2) of the commentary on draft guideline 2.3.1.

CHAPTER XI

FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW

A. Introduction

439. Following its consideration of a feasibility study[358] that had been undertaken on the topic entitled "Risks ensuing from fragmentation of international law" at its fifty-second session (2000), the Commission decided to include the topic in its long-term programme of work.[359] At its fifty-fourth session (2002), the Commission included the topic in its programme of work and established a Study Group. It also decided to change the title of the topic to "Fragmentation of international law: difficulties arising from the diversification and expansion of international law".[360] In addition, the Commission agreed on a number of recommendations, including on a series of studies to be undertaken, commencing with a study by the Chairman of the Study Group on the question of "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'".

440. At its fifty-fifth session (2003), the Commission appointed Mr. Martti Koskenniemi as Chairman of the Study Group. The Study Group set a tentative schedule for work to be carried out during the remaining part of the present quinquennium (2003-2006), distributed among members of the Study Group work on the other studies agreed upon in 2002, and decided upon the methodology to be adopted for that work. The Study Group also held a preliminary discussion of an outline produced by the Chairman of the Study Group on the question of the "Function and scope of the *lex specialis* rule and the question of 'self-contained regimes'".

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[358] G. Hafner, "Risks Ensuing from Fragmentation of International Law", *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), annex.

[359] Ibid. (A/55/10), para. 729.

[360] Ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10), paras. 492-494.

441. At its fifty-sixth session (2004), the Commission reconstituted the Study Group. It held discussions on the study on the "Function and scope of the *lex specialis* rule and the question of 'self-contained regimes'", as well as discussions on the outlines prepared in respect of the other remaining studies.[361]

B. Consideration of the topic at the present session

442. At the current session, the Study Group was reconstituted and it held 8 meetings on 12, 17 and 23 May, on 2 June, on 12, 18, 27 July and on 3 August 2005. It had before it the following: (a) a memorandum on regionalism in the context of the study on "the function and scope of the *lex specialis* rule and the question of self-contained regimes"; (b) a study on the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community; (c) a study on the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties); (d) a study on the modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties); and (e) a study on hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules. The Study Group also had an informal paper on the "Disconnection Clause".[362]

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[361] (a) the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community; (b) the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties); (c) the modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties); and (d) hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules.

[362] The documents are available from the Codification Division of the Office of Legal Affairs.

443. At its 2859th, 2860th and 2864th meetings, on 28 and 29 July and on 3 August 2005, the Commission held an exchange of views on the topic on the basis of a briefing by the Chairman of the Study Group on the status of work of the Study Group.

444. At its 2865th meeting, on 4 August 2005, the Commission took note of the Report of the Study Group.

C. Report of the Study Group

1. General comments and the projected outcome of the Study Group's work

445. Following the pattern of the previous year, the Study Group commenced its discussions with a general review of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-ninth session, prepared by the Secretariat (A/CN.4/549, section E).

446. The Study Group took note of the broad endorsement of its work thus far in the deliberations of the Sixth Committee. The Group confirmed its wish to complete its task on the basis of the schedule, programme of work, and methodology agreed upon during the 2003 session of the Commission (A/58/10, paras. 424-428).

447. The Study Group reaffirmed its approach to focus on the substantive aspects of fragmentation in the light of the Vienna Convention on the Law of Treaties, while leaving aside institutional considerations pertaining to fragmentation. Taking note of the deliberations in the Sixth Committee, it reiterated its intention to attain an outcome that would be concrete and of practical value especially for legal experts in foreign offices and international organizations. Its work should thus contain critical analyses of the experience of fragmentation in various international organs and institutions and it should yield an outcome that will be helpful in providing resources for judges and administrators coping with questions such as conflicting or overlapping obligations emerging from different legal sources. This will require a description of the actual problems in their social context.

448. The Study Group reaffirmed its intention to prepare, as the substantive outcome of its work, a single collective document consisting of two parts. One part would be a relatively large analytical study on the question of fragmentation, composed on the basis of the individual outlines and studies submitted by individual members of the Study Group during 2003-2005 and discussed in the Group. This would consist of a description and analysis of the topic from the point of view of, in particular, the Vienna Convention on the Law of Treaties. The other part would consist of a condensed set of conclusions, guidelines or principles emerging from the studies and the discussions in the Study Group. This would be a concrete, practice-oriented set of brief statements that would work, on the one hand, as the summary and conclusions of the Study Group's work and, on the other hand, as a set of practical guidelines to help thinking about and dealing with the issue of fragmentation in legal practice. A draft of both documents would be submitted by the Study Group for adoption by the Commission in 2006.

2. Discussion of a memorandum on "regionalism" in the context of the Study on the "Function and scope of the *lex specialis* rule and the question of 'self-contained regimes'"

449. The Study Group continued its substantive discussion on the study of the function and scope of the *lex specialis* rule and the question of "self-contained regimes" with a review of a memorandum on Regionalism by its Chairman.

450. It was noted in the memorandum that the expression "regionalism" did not figure predominantly in treatises of international law and in the cases in which it was featured it rarely took the shape of a "rule" or a "principle". It was often raised in discussions concerning the universality of international law, in the context of its historical development and the influences behind its substantive parts. It only arose in rare cases in a normative sense as a claim about regional *lex specialis*.

451. There were at least three distinct ways in which "regionalism" was usually understood, namely: (a) as a set of distinct approaches and methods for examining international law; (b) as a technique for international law making; and (c) as the pursuit of geographical exceptions to universal rules of international law.

452. The first - regionalism as a set of approaches and methods for examining international law - was the most general and broadest sense. It was used to denote particular orientations of legal thought or historical and cultural traditions. Such is the case with the "Anglo-American" tradition or the "continental" tradition of international law,[363] or "Soviet" doctrines[364] or "Third World Approaches"[365] to international law.

453. Although it is possible to trace the sociological, cultural and political influence that particular regions have had on international law, such influences do not really address aspects of fragmentation as coming under the mandate of the Study Group. These remain historical or cultural sources or more or less continuing political influences behind international law. There is a very strong presumption among international lawyers that, notwithstanding such influences, the law itself should be read in a universal fashion.[366] There is no serious claim that some rules should be read or used in a special way because they emerged as a result of a "regional" inspiration.

454. Very often regional particularity translates itself or becomes apparent as a functional one: a regional environmental or a human rights regime, for example, may be more important because of its environmental or human rights focus than as a regional regime. This type of differentiation

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[363] See generally, Hersch Lauterpacht, "The So-Called Anglo-American and Continental Schools of Thought in International Law", B.Yb.I.L., vol. XII (1931), pp. 31-62. See also, for example, Edwin D. Dickinson, "L'interprétation et l'application du droit international dans les pays anglo-américains", 129 *RCADI* (1970), pp. 305-395.

[364] Kazimierz Grzybowski, *Soviet Public International Law: Doctrines and Diplomatic Practice* (Leiden: A.W. Sijthoff, 1970); Tarja Långström, *Transformation in Russia and International Law* (The Hague: Nijhoff, 2002).

[365] Antony Anghie and B.S. Chimni, "Third World Approaches to International Law and Individual Responsibility in International Conflicts", in Steven R. Ratner and Anne-Marie Slaughter (eds.), *The Methods of International Law* (Washington D.C.: ASIL, 2004), pp. 185-210.

[366] See generally Robert Jennings, "Universal International Law in a Multicultural World", in Maarten Bos and Ian Brownlie (eds.), *Liber Amicorum for the Right Honourable Lord Wilberforce* (Oxford: Clarendon, 1987) pp. 39-51.

does not need further separate treatment since it already forms the gist of the study on the "Function and scope of the *lex specialis* rule and the question of 'self-contained regimes'" that was exhaustively debated in the Study Group last year.[367]

455. The second type of regionalism - a regional approach to international law-making - conceives regions as privileged forums for international law-making because of the relative homogeneity of the interests and actors concerned. It is sometimes suggested, for example, that international law should be developed in a regional context, since its implementation would thus be more efficient and equitable and the relevant rules would be understood and applied in a coherent manner. Regionalism in this sense is often propounded by sociological approaches to international law.[368] No doubt it is sometimes advisable to limit the application of novel rules to a particular region. Much of international law has developed in this way, as the gradual extension of originally regional rules to areas outside the region. However, this sociological or historical perspective, too, falls largely outside the focus of the Study Group. Moreover, the legislative concern in such cases is also often more significant by virtue of the nature of the rules being propounded (that is to say, as rules about "trade" or "environment") than owing to whatever regional linkage is being proposed.

456. The third situation - regionalism as the pursuit of geographical exceptions to universal rules of international law - seems more relevant in this context. It could be analysed: (a) in a positive sense, as a rule or a principle with a regional sphere of validity in relation to a universal rule or principle; or (b) in a negative sense, as a rule or a principle that imposes a limitation on the validity of a universal rule or principle. In the former case, the rule in question would be binding only on the States of the particular region, while in the latter sense, States concerned would be exempted from the application of an otherwise universal rule or principle. As far as this second ("negative") sense is concerned, it does not seem to have any independence from the

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[367] For distinctions of special regimes including on the basis of functional specialization, see the Preliminary report on the study on the "Function and Scope of the *lex specialis* rule and the question of 'self-contained regimes'", ILC(LVI)/SG/FIL/CRD.1 and Add.1.

[368] Georges Scelle, *Cours de droit international public* (Paris: Domat-Montchrestien, 1948), p. 253. See also Hedley Bull, *The Anarchical Society. A Study of Order in World Politics* (London: Macmillan, 1977) First edition, pp. 305-6.

more general question, debated by the Study Group last year, of the possibility and consequences of (a regional) *lex specialis*: the conditions under which a regional rule may derogate from a universal one seem analogous with or identical to the problems dealt with last year.[369]

457. It is undoubted that States in a region may, by treaty or otherwise, establish a special law applicable in their mutual relations. In this regard, the "positive sense" merely describes a truism. However, there is a stronger claim to the effect that there may come to existence also types of regional law that are binding on all the States of the region, or other States in their relations with the States of the region, independently of the consent of the latter.

458. Such a claim was dealt with, albeit inconclusively, by the International Court of Justice in the *Asylum* case as well as in the *Haya de la Torre* case, where Colombia contended inter alia that a "regional law" had emerged on diplomatic protection,[370] with the purpose of deviating from the general law. Such law was applicable, in the view of Colombia, even on States of the region that did not accept it.[371] In his dissenting opinion, Judge Alvarez asserted that such rule was not only "binding upon all States of the New World" and "binding upon all the States of the New World" though it "need not be accepted by all [of them]" but also on all other States "in matters affecting America".[372] However, the Court did not pronounce itself on the conceptual possibility of the existence of rules binding automatically on States of a region and binding other States in their relationship with those States. It treated the claim by Colombia as a claim about customary law and dismissed it on account that Colombia had failed to produce evidence of its existence. However, it is very difficult to accept - and there are no uncontested cases on this -

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[369] Preliminary report by Mr. M. Koskenniemi, Chairman of the Study Group, on the study on the "Function and scope of the *lex specialis* rule and the question of 'self-contained regimes'", supra, note 367.

[370] See the "Observations du gouvernement du Colombie sur l'existence du droit international américain. Réplique du gouvernement Colombien" (20 IV 50), *Asylum* case, *I.C.J. Pleadings*, 1950, vol. 13 (1), p. 316, at pp. 330-334.

[371] Mémoire du gouvernement Colombien, *Haya de la Torre* case, *I.C.J. Pleadings*, 1951, vol. 17, p. 17, at pp. 25-27.

[372] Dissenting opinion, Judge Alvarez *Asylum* case. *I.C.J. Reports*, 1950, p. 290, at pp. 293-294.

that a regional rule might be binding on States of a region, or other States, without the consent of the latter. Apart from other considerations, there are no unequivocal ways of determining the membership of particular States in geographical regions.

459. Attention was also drawn to two specific issues in the context of regionalism as the pursuit of geographical exceptions to universal rules, which may still require separate treatment, namely: (a) the question of universalism and regionalism in the context of human rights law; and (b) the relationship between universalism and regionalism in the context of the collective security system under the Charter of the United Nations. The former - universalism and regionalism in human rights - raised philosophical questions of cultural relativism which fall outside the scope of the Study. In any case, regional human rights regimes may also be seen as the varying, context-sensitive implementation and application of shared standards, and not as exceptions to general norms. This would imply that such matters would fall under the more general question of the relationship between the general and the special law in the study on the function and scope of the *lex specialis*.

460. The latter - collective security under Chapter VIII of the Charter of the United Nations - raised the question of the priority of competence between regional agencies and arrangements and the Security Council in taking enforcement action. In view of Article 52 (2) of the Charter, any action by such agencies or arrangements may not be considered an "exception" to the competence of the Security Council. Chapter VIII of the Charter should therefore be seen as a set of functional provisions that seek the most appropriate level of dealing with particular issues under notions of "subsidiarity".

461. The Study Group expressed support for the general orientation of the memorandum. While members noted that "regionalism" generally fell under the problem of *lex specialis*, some still felt that this was not all that could be said about it. In some fields such as trade, for example, regionalism was influencing the general law in such great measure that it needed special highlighting. Especially practices by the European Union as well as States of the Latin American region were emphasized. Although the opinion was expressed that a study on the role and nature of European law would be worthwhile, most members felt that this could not be accomplished in the time available.

462. It was pointed out that human rights law, for example, had always been fragmented into different compartments: political rights, economic rights, rights of the third generation, and so on. It was agreed, however, that the Study Group should not embark upon a discussion of problems of cultural relativism in human rights. In regard to security issues, the opinion was expressed that although the principle of non-intervention was more entrenched in the Western hemisphere than elsewhere, there might be a need to mention recent activities of regional organizations such as the African Union in peacekeeping and peace enforcement. However, others expressed the view that the regional approaches under Chapter VIII of the Charter did not emerge as "fragmentation" but concerned the application of specific Charter provisions.

463. The Study Group held a separate discussion, on the basis of a paper by one of its members, Mr. C.P. Economides, of the so-called "disconnection clause" that had been inserted in many multilateral conventions, according to which in their relations *inter se* certain of the parties to the multilateral convention would not apply the rules of the convention but specific rules agreed among themselves. This clause had often been inserted at the request of the members of the European Union. In particular, three types of such clauses had typically been made. As a general rule, the exclusion of the provisions of the relevant treaty was complete;[373] and in exceptional cases, it was partial,[374] or optional.[375] The objective of such clauses was to ensure

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[373] For example article 27 (1) of the European Convention on Transfrontier Television, Strasbourg, 1989, provides:

> "In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except insofar as there is no Community rule governing the particular subject concerned."

See also article 25 (2) of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, Lugano, 1993.

[374] Article 20 (2) of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, Kiev, 2003, provides:

> "In their mutual relations, Parties which are members of the European Community shall apply the relevant Community rules instead of articles 15 and 18."

[375] Article 13 (3) of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome, 1995, provides:

that European law takes precedence over the provisions of the multilateral convention in the relations among States members of the Community and between those States and the Community itself. The clause had no effect on the rights and obligations of States not members of the Community or of the Community itself, or States members of the Community towards them.

464. Some members felt that the proliferation of such clauses was a significant negative phenomenon. The opinion was even expressed that such clauses might be illegal inasmuch as they were contradictory to the fundamental principles of treaty law. Others, however, observed that whatever their political motives or effects, such clauses were still duly inserted in the relevant conventions and their validity thus followed from party consent. It was difficult to see on what basis parties might be prohibited from consenting to them. The Study Group agreed, however, that such clauses might sometimes erode the coherence of the treaty. It was important to ensure that they would not be used to defeat the object and purpose of the treaty. Nonetheless, it was felt impossible to determine their effect *in abstracto*.

465. It was also pointed out that in some situations the result may not be as problematic, particularly if the obligations assumed by the parties under the disconnection clause were intended to deal with the technical implementation of the provisions of the multilateral convention or are more favourable than those of the regime from which it departs.

466. On the basis of the discussion, the Study Group agreed that "regionalism" should not have a separate entry in the final substantive report. Rather, various aspects of the memorandum and the debate would be used as examples in the overall *schema* of the topic, especially in connection with the *lex specialis* rule. Mention of regionalism as a factor contributing to fragmentation should also be included in the introduction of the final report. It should be borne in mind, however, that its role was not only negative. It was often useful as a form of

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"In their relations with each other, Contracting States which are Members of organizations of economic integration or regional bodies may declare that they will apply the internal rules of these organizations or bodies and will not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules."

implementing general law (as in the UNCLOS for instance). The question of the disconnection clause as a special treaty technique used by the European Union would be dealt with in the context of the analyses of understanding various relationships between the general law and the special law in the study on the "Function and scope of the *lex specialis* rule and the question of 'self-contained regimes'".

3. Discussion on the Study on the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community

467. The Study Group also discussed a revised paper by Mr. Mansfield on "The interpretation of treaties in the light of 'any relevant rules of international law applicable in the relations between the parties' (article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community."[376] It was recalled that according to article 31 (3) (c) of the Vienna Convention, treaties were to be interpreted within the context of "any relevant rules of international law applicable in the relations between the parties". The provision thus helped to place the problem of treaty relations in the context of treaty interpretation. It expressed what could be called a principle of "systemic integration", that is to say, a guideline according to which treaties should be interpreted against the background of all the rules and principles of international law - in other words, international law *understood as a system*. The negotiation of individual treaties usually took place as separate diplomatic and practical exercises, conducted by experts in the particular field of regulatory substance covered by the treaty. It was the objective of article 31 (3) (c) to connect the separate treaty provisions that followed from such exercises to each other as aspects of an overall aggregate of the rights and obligations of States. As an interpretative tool, the principle expresses the nature of a treaty as an agreement "governed by international law".[377]

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[376] See also Campbell McLachlan, "The principle of systemic integration and article 31 (3) (c) of the Vienna Convention", *54 I.C.L.Q.* (2005), pp. 279-320.

[377] *Vienna Convention on the Law of Treaties*, article 2 (1) (a).

468. The provision was not a panacea in reducing fragmentation, however. Indeed, article 31 (3) (c) was not equipped as a technique to resolve conflicts or overlaps between rules of international law - it merely calls upon lawyers to interpret treaties so as to ensure consistency with their normative environment. As such, the provision takes its place alongside a wide set of provisions in the Vienna Convention and pragmatic techniques of conflict-resolution.[378]

469. In the past, article 31 (3) (c) has not often been resorted to. Indeed, the article has been sometimes criticized for providing little guidance as to when and how it is to be used; what to do about overlapping treaty obligations; whether it took account also of customary rules and whether the "relevant rules of international law applicable in the relations between the parties" referred to the law in force at the conclusion of the treaty or otherwise.[379] However, recent practice showed a considerably increased recourse to the provision. It has been resorted to, for example, by the Iran-United States Claims Tribunal,[380] the European Court of Human Rights,[381] Arbitral Tribunals established pursuant to multilateral agreements,[382]

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[378] These include the other techniques being discussed by the Study Group.

[379] See separate opinion of Judge Weeramantry in *Case Concerning the Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*, *I.C.J. Reports*, 1997, p. 7, at 114. See also Hugh W.A. Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989 (Part Three)", B.Yb.I.L., vol. 62 (1991), p. 1, at p. 58.

[380] *Esphahanian v. Bank Tejarat* (1983) *2 I.U.S.C.T.R.* 157. See also *Case No. A/18* (1984) *5 I.U.S.C.T.R.* 251, at p. 260. The provision was also relied upon in a dissent in *Grimm v. Iran*, *2 I.U.S.C.T.R.* 78, at p. 82 on the question of whether a failure by Iran to protect an individual could constitute a measure "affecting property rights" of his wife. See also *Amoco International Finance Corporation v. Iran* (1987-II) *15 I.U.S.C.T.R.* 189, at p. 222.

[381] *Golder v. United Kingdom*, ECHR 1975 Ser. A No. 18 and *Loizidou v. Turkey*, ECHR 1996 Ser. A, vol. VI. See also *Fogarty v. United Kingdom*, Application No. 37112/97, ECHR 2001, vol. XI, p. 157; *McElhinney v. Ireland*, Application No. 31253/96, ECHR 2001, vol. XI, p. 37; *Al-Adsani v. United Kingdom*, Application No. 35763/97, ECHR 2001, vol. XI, p. 79; *Banković v. Belgium*, ECHR 2001, vol. XII, p. 333.

[382] Permanent Court of Arbitration: *Dispute concerning access to information under article 9 of the OSPAR Convention: Ireland v. United Kingdom*, Final Award 2 July 2003, *42 I.L.M.* (2003) 1118. See also: The International Tribunal for the Law of the Sea: the *Mox Plant case (Ireland v. United Kingdom)*, Request for Provisional Measures Order, 3 December 2001, www.itlos.org; Permanent Court of Arbitration, *Mox Plant (Ireland v. United Kingdom)*, Order No. 3 (24 June 2003), *42 I.L.M.* (2003), 1187. See also *Pope and Talbot Inc v. Canada* before

the Appellate Body within the WTO Dispute Settlement Understanding,[383] as well as the International Court of Justice.[384] In order to "operationalize" article 31 (3) (c) it was suggested to: (i) reinstate the central role of general international law in treaty interpretation; (ii) locate the relevance of other conventional international law in this process; and (iii) shed light on the position of treaties in the progressive development of international law over time ("inter-temporality"). In this connection, the revised report by Mr. Mansfield offered a series of propositions for consideration.

470. First, according to the principle of "systemic integration", attention should, in the interpretation of a treaty, also be given to the rules of customary international law and general principles of law that are applicable in the relations between the parties to a treaty. This principle could be articulated as a negative as well as a positive presumption.

(a) *Negatively* in that entering into treaty obligations, the parties would be assumed not to have intended to act inconsistently with customary rules or with general principles of law; and

(b) *Positively* in that parties are taken "to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way".[385]

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the NAFTA Tribunal, Award on the merits, 10 April 2001; award in respect of damages, 31 May 2002, *41 I.L.M.* (2002), 1347 and at www.worldtradelaw.net/nafta/chap11interp.pdf.

[383] WTO Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products ("US - Shrimp")*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755; WTO Appellate Body Report, *European Communities - Measures Concerning Meat and Meat Products (Hormones) ("EC - Hormones")*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135.

[384] *Case concerning Oil Platforms (Islamic Republic of Iran v. United States), I.C.J. Reports*, 2003, p. 161. See also separate opinion of Judge Weeramantry in *Case Concerning the Gabčikovo-Nagymaros Project (Hungary v. Slovakia), I.C.J. Reports*, 1997, p. 88, at 114.

[385] *Georges Pinson* No. 50, *Franco-Mexican Commission* (Verzijl President) AD 1927-8 No. 292: "Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way."

471. The importance of custom and general principles is highlighted whenever a treaty provision is unclear or open-textured or when the terms used in the treaty have a recognized meaning in customary international law, to which the parties can therefore be taken to have intended to refer.[386] The process may on occasion involve extensive investigation of sources outside the treaty in order to determine the content of the applicable rule of custom or general principle (as in *Al-Adsani* and *Oil Platforms*). The significance of rules of customary international law and general principles of law in this process is in the fact that they perform a systemic or constitutional function in describing the operation of the international legal order.[387]

472. Second, where another treaty is applicable in the relations between the parties this raises the question of whether it is necessary that *all* the parties to the treaty, being interpreted, are also parties to the treaty relied upon as the other source of international law for interpretation purposes? Four answers to this question may be contemplated.

(a) That all parties to the treaty under interpretation should also be parties to any treaty relied upon for its interpretation.[388] This is a clear but very narrow standard. The resulting problems might be alleviated by making a distinction between using the other treaty for the purposes of *interpretation* or *application*. In any case, such other treaty may always be used as evidence of a common understanding between the parties;

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[386] For example, as in the construction of the terms "fair and equitable treatment" and "full protection and security" in *Pope & Talbot Inc. v. Canada*.

[387] Examples of customary rules include: the criteria of statehood (*Loizidou*); the law of State responsibility (which has influenced both the reach of human rights obligations (*Loizidou, Issa v. Turkey*) (Application No. 31831/96, 16 November 2004) - see also the reliance on the public international law rules of jurisdiction in *Banković v. Belgium* 123 (supra, note 381, at pp. 351-352, paras. 59-60 - and the law of economic countermeasures in the WTO DSU); the law of State immunity; the use of force; and the principle of good faith (*US - Shrimp*).

[388] This was the approach adopted by the GATT Panel Report, *United States - Restrictions on Imports of Tuna* ("*USA - Tuna II*"), DS29/R, 16 June 1994, unadopted, *33 I.L.M.* (1994) 839, at para. 5.19.

(b) That the parties in the *dispute* are also parties to the other treaty. This approach would broaden the range of treaties potentially applicable for interpretation purposes. However, it would run the risk of inconsistent interpretations depending on the happenstance of the particular treaty partners in dispute;

(c) That the rule contained in a particular treaty be required to possess the status of customary international law.[389] This approach has the merit of rigour but it might be inappropriately restrictive in regard to treaties which have wide acceptance in the international community (including by the disputing States) but are not in all respects stating customary international law (such as UNCLOS);

(d) That although complete identity of treaty parties would not be required, the other rule relied upon could be said to have been implicitly accepted or tolerated by all parties to the treaty under interpretation.[390]

473. The third problem left open by the formulation of article 31 (3) (c) concerned inter-temporality, that is, in regard to the other rules of international law in the interpretation of a treaty, is the interpreter limited to international law applicable at the time the treaty was adopted or may subsequent treaty developments, too, be taken into account?[391] Here a distinction might be made between subsequent treaties that may affect the *application* of the treaty to be interpreted (the process of the *actualization* or *contemporization* of the latter treaty)[392] and those

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[389] See, for example, the emphasis placed in *US - Shrimp* on the fact that, although the United States had not ratified UNCLOS, it had accepted during the course of argument that the relevant provisions for the most part reflected international customary law.

[390] Pauwelyn supports this approach in the case of the WTO Covered Agreements. See Joost Pauwelyn, *Conflict of Norms in Public International Law - How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003), pp. 257-263.

[391] The reference in the title to the Study of Mr. Mansfield to interpretation "in the context of general developments in international law and concerns of the international community" refers to inter-temporality, a problem which was not expressly resolved by the Commission at the time when it framed the Vienna Convention.

[392] OSPAR Tribunal Arbitral Award in *Mox Plant*, p. 1138, para. 103.

that may affect the *interpretation* of the treaty itself, that is to say, cases where the concepts in the treaty are themselves "not static but evolutionary".[393] Although there was support for the principle of contemporaneity (that is, that only provisions contemporaneous to the treaty under interpretation should be taken account of), it could not be excluded a priori that the parties might intend the interpretation and application of a treaty to follow subsequent developments.

474. However, a safe guide to a decision on the matter may not be found in the imputed intention of the parties alone. Rather, the interpreter must find concrete evidence of the parties' intentions in this regard in the material sources referred to in articles 31 and 32 of the Vienna Convention, namely: in the terms themselves; the context; the object and purpose of the treaty; and, where necessary, the *travaux*.[394]

475. The Study Group welcomed the revised paper by Mr. Mansfield, endorsing in general terms the adoption of an interpretative approach to article 31 (3) (c) that may be of practical use to judges and administrators. The approach taken to achieve systemic integration was felt to be consistent with the approach taken by the Group in its discussion of the Chairman's report on the *lex specialis* and the question of "self-contained regimes" the previous year.[395] Some members still felt that there was, perhaps, a need for a grounding of such a principle in the Vienna Convention itself. Accordingly, the Study Group preferred to refer, instead of "principle", to the "objective" of systemic integration. According to this objective, whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact.

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[393] Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, 9th ed. (London: Longman, 1992), at p. 1282.

[394] The International Court of Justice has, on several occasions, accepted that this process may be permissible where the parties insert provisions into their treaty which *by their terms or nature* contemplate evolution. This was done most recently in the *Case Concerning the Gabčikovo-Nagymaros Project* (*Hungary v. Slovakia*), *I.C.J. Reports*, 1997, p. 7, at 76-80. See also the Separate Opinion of Judge Weeramantry, ibid., pp. 113-115. See also, for example, *Namibia (Legal Consequences)*, Advisory Opinion, *I.C.J. Reports*, 1971, p. 16, at p. 31; *Aegean Sea Continental Shelf Case* (*Greece v. Turkey*), *I.C.J. Reports*, 1978, p. 3, at p. 32.

[395] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10).

476. The Study Group accepted that there was a need to operationalize article 31 (3) (c). However, it was also widely felt that the relationship between paragraphs (a) and (b) of article 31 (3) and its paragraph (c) needed to be clarified. Article 31 (3) (c) was not to be used outside of the general context of article 31. Some doubt was also expressed regarding the possibility to go very far in determining rules of treaty interpretation. Such interpretation was a rather "artistic" activity that could scarcely be grasped by firm rules or processes.

477. The Study Group highlighted the flexibility built into article 31 (3) (c). It accepted that the rules referred to in article 31 (3) (c) included not only other treaty rules but also rules of customary law and general principles of law. Concerning the role of custom and general principles it was noted that in addition to the situations mentioned in paragraph 471 above, custom and general principles may be relevant also where the treaty regime collapses. If several rules from different sources (treaty, custom, general principles) might be applicable, the view, also expressed last year, was reiterated that though there was no formal hierarchy between the legal sources, lawyers tended to look first at treaties, then customary rules and then general principles in seeking answers to interpretative problems.

478. Regarding other applicable conventional international law, the Study Group felt that it did not need to take a definite position on the four solutions suggested in paragraph 472 above. The task for determination rested upon the judge or the administrator on the basis of the nature of the treaty under interpretation and the concrete facts in each case. It was also suggested that a fifth solution might be considered, namely that all relevant rules of international law applicable in relations between the parties be taken into account and given whatever weight might be appropriate under the circumstances.

479. Regarding inter-temporality, there was support for the principle of contemporaneity as well as the evolutive approach. Again the Study Group felt it should not make a choice between the various positions. It saw its role as limited to indicating the possible options available to the judge or administrator charged to answer the question of whether the reference to "other relevant rules" in article 31 (3) (c) was limited to rules in force when the treaty was adopted or could be extended to also cover subsequent treaties.

4. Discussion of the Preliminary Report on "Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules"

480. The Study Group also considered a revised report by Mr. Z. Galicki on "Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules". The report outlined relevant aspects to be considered with respect to the concept of hierarchy in international law, gave a brief description of *jus cogens*, obligations *erga omnes*, and the nature of obligations under Article 103 of the Charter, and practical examples in which some of these categories have been addressed,[396] as well as raised issues concerning possible relationships between them. The report also considered the potential impact of the three categories as conflict rules on the process of fragmentation of international law, particularly on other norms of international law; and highlighted the connection of this study with the other studies related to fragmentation of international law.

481. In the main, it was suggested that the concept of hierarchy in international law should be approached and discussed by the Study Group from the point of view of hierarchy of norms and obligations, without a priori excluding other possible concepts of hierarchy. It was also pointed out that the concept of hierarchy in international law was developed especially by doctrine.

482. It was also noted that norms of *jus cogens*, obligations *erga omnes*, and obligations under the Charter of the United Nations (Article 103 of the Charter) should be treated as three parallel and separate categories of norms and obligations, taking into account their sources, their substantive content, territorial scope, and practical application. All three categories were also

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[396] For example, *Barcelona Traction* case, *I.C.J. Reports*, 1970, p. 3, at p. 32; *East Timor (Portugal v. Australia)*, *I.C.J. Reports*, 1995, p. 99, at p. 102; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, Judgment, *I.C.J. Reports*, 1996, 595, at p. 616; *Reservations to the Genocide Convention*, *I.C.J. Reports*, 1951, 15, at p. 23; Separate Opinion Judge Lauterpacht, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, *I.C.J. Reports*, 1993, p. 407, at p. 440, para. 100. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, reproduced in document A/ES-10/273 and Corr.1. See also http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm (last visited 13 July 2005).

characterized by certain weaknesses: (a) norms of *jus cogens* lacked a definitive catalogue and the concept as such was not entirely uncontested; (b) obligations *erga omnes* were often of a very general nature, both in substance and in their application, and they involved "the legal interests of all States", which may develop over time; (c) unlike norms of *jus cogens* and obligations *erga omnes*, obligations under Article 103 of the Charter were formally limited to States that are members of the United Nations.

483. Although the three categories raised a wide range of theoretical and practical questions, it was reiterated that the Study Group should only examine them as "conflict rules" in the context of difficulties arising from the diversification and expansion of international law. The objective should be to come up with guidelines of a general character, bearing in mind the difficulty of identifying hierarchical structures between norms.

484. The report further highlighted the close connection between the study on hierarchy in international law and the other four studies. The conclusions by the Study Group on this study would thus depend on the conclusions emerging from the other studies, and the former would in return have consequences for the results of the latter. In this connection, it was suggested that conclusions could be further developed around a number of clusters concerning (a) the general concept of hierarchy in international law; (b) the acceptance and rationale of hierarchy in international law; (c) the relationship between the various norms under consideration; and (d) the relationship between hierarchy and fragmentation of international law. As regards the relationship between the various norms under consideration, the paper by Mr. Galicki suggested the necessity to recognize the principle of harmonization.

485. In the ensuing discussion, it was noted that the current study was the most abstract and academic one among the five studies identified. It was therefore necessary to bear in mind the views expressed in the Sixth Committee and to proceed in as concrete a fashion as possible. In this connection, it was stressed that the Study Group should focus on hierarchy and other possible relationships between norms of international law in the context of fragmentation. It should seek to employ the technique, followed in the other studies, of setting the subject of legal reasoning within an international legal system in relation to the three categories, as conflict rules.

486. It was considered essential to study how hierarchy served as a tool to resolve conflicts, the acceptance and rationale of the hierarchy in relation to practical examples concerning the three categories, as well as the context in which hierarchy operated to set aside an inferior rule and the consequences of such setting aside.

487. While there was no hierarchy as such between sources of international law, general international law recognized that certain norms have a peremptory character. Certain rules were recognized as superior or having a special or privileged status because of their content, effect, scope of application, or on the basis of consent among parties. The rationale of hierarchy in international law found its basis in the principle of the international public order, and its acceptance is reflected in examples of such norms of *jus cogens*, obligations *erga omnes*, as well as treaty-based provisions such as Article 103 of the Charter.[397] The notion of public order is a recognition of the fact that some norms are more important or less important than others. Certain rules exist to satisfy the interests of the international community as a whole. Some members of the Study Group, however, felt that the metaphor of hierarchy in international law was not analytically helpful, and that it needed to be contextualized within specific relationships between norms of international law. It was stressed that hierarchy operated in a relational and contextual manner.

488. It was clearly understood that, while norms of *jus cogens* and obligations arising under Article 103 of the Charter addressed aspects of hierarchy, obligations *erga omnes* were more concerned with the scope of application of norms, rather than hierarchy. The qualification of norms as *erga omnes* did not imply any hierarchy. In exploring such relationships, the Study Group could also survey other provisions in multilateral treaty regimes of a hierarchical nature similar to Article 103, as well as take into account the special status of the Charter of the United Nations in general. Inasmuch as obligations *erga omnes* did not implicate normative hierarchy, it was suggested that this would be better addressed under the title "norms with special status in international law".

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[397] For example, Articles on Responsibility of States for Internationally Wrongful Acts, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10).

489. The concept of *jus cogens* has been widely accepted by the doctrine and finds reflection in the Vienna Convention.[398] The Commission has previously resisted the effort of compiling a catalogue of norms of *jus cogens* and decided "to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals".[399] On this basis, the Study Group agreed that it would not seek to produce a catalogue of norms of *jus cogens*.

490. While hierarchy may solve conflicts of norms, it was acknowledged that conflicts between norms of *jus cogens*, obligations *erga omnes*, and obligations under Article 103 of the Charter could also emerge. In regard to the complex relationship between obligations *erga omnes* and norms of *jus cogens*, it was observed that while all *jus cogens* obligations had an *erga omnes* character, the reverse was not necessarily true. This had also been the view of the Commission in its Articles on Responsibility of States for Internationally Wrongful Acts.[400] The Study Group would retain such a position. It was also noted that the recent ICJ advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was pertinent to this relationship.[401]

491. As regards the relationship between norms of *jus cogens* and obligations under Article 103, some Members highlighted its complex nature, while others stressed the absolute priority of the former over the latter.

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[398] Article 53 of the Vienna Convention: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Article 64 of the Vienna Convention: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

[399] *Yearbook ... 1966*, vol. II, p. 172, at p. 248.

[400] Article 40 (1) Articles on State Responsibility: "This Chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law." Article 48 (1) (b): "... the obligation breached is owed to the international community as a whole".

[401] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, supra, note 396.

492. The Study Group identified the need to address the effects of the operation of norms of *jus cogens*, obligations *erga omnes*, and obligations under Article 103 of the Charter (or similar treaty provisions). Norms of *jus cogens* were non-derogable and the effect of this operation was to produce the invalidity of the inferior norm. By contrast, obligations *erga omnes* related to the opposability of the obligations to all States, in particular to the right of every State to invoke their violation as a basis for State responsibility. It was also observed that a distinction should be made between the invalidity of the inferior rule that resulted from the presence of *jus cogens* and the inapplicability of the inferior rule resulting from the operation of Article 103.

493. Some members of the Study Group doubted that the principle of harmonization had a particular role to play in the relationship between norms of *jus cogens* and other norms. The Study Group nevertheless recognized that the principle of harmonization should be seen as a cross-cutting interpretive principle, applicable also in hierarchical relations to the extent possible.[402]

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[402] Study by the Chairman on "Function and Scope of the *lex specialis* rule and the question of 'self-contained regimes'", supra, note 367.

CHAPTER XII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Programme, procedures and working methods of the Commission and its documentation

494. At its 2832nd meeting, held on 3 May 2005, the Commission established a Planning Group for the current session.

495. The Planning Group held four meetings. It had before it section H of the topical summary of the discussion held in the Sixth Committee of the General Assembly at its fifty-ninth session, entitled "Other decisions and conclusions of the Commission", and General Assembly resolution 59/41 (paras. 6, 7, 8, 13, 14 and 17), on the report of the International Law Commission on the work of its fifty-sixth session.

496. At its 2859th meeting on 28 July 2005, the Commission took note of the report of the Planning Group.

1. Cost-saving measures

497. The Commission, having considered paragraph 8 of General Assembly resolution 59/41, budgetary constraints and the requirements of the programme of work of the Commission for the current session resulting from unforeseeable circumstances, decided that it should start the second part of the fifty-seventh session on 11 July 2005, thereby reducing the duration of the session by one week.

2. Documentation

498. The Commission considered the issue of timely submission of reports by Special Rapporteurs. It recalled that if the dates for the submission of reports as originally indicated by the Special Rapporteurs were not observed, the availability of reports might be jeopardized, which could have far-reaching consequences for the programme of work of the Commission. Bearing in mind the principles governing the submission of documents in the United Nations as well as the heavy workload of the relevant services of the Organization, the Commission wishes to emphasize the importance it attaches to the timely submission of reports

by Special Rapporteurs, with a view to their processing and to their distribution sufficiently in advance to allow members to study the reports.

3. Working Group on the long-term programme of work

499. The Working Group on the long-term programme of work was reconstituted with Mr. Pellet as Chairman. The Working Group held two meetings and its Chairman reported orally to the Planning Group on 25 July 2005. The Working Group intends to submit a full report together with the topics that it proposes for inclusion in the long-term programme of work at the end of the quinquennium.

4. New topic for inclusion in the current programme of work of the Commission

500. At its 2865th meeting, on 4 August 2005, the Commission decided that the topic "the obligation to extradite or prosecute (aut dedere aut judicare)", which is already included in the Commission's long-term programme of work, be included in the programme of work of the Commission, in accordance with the decision taken by the Commission at its fifty-sixth session (A/59/10, para. 363). At the same meeting, the Commission decided to appoint Mr. Zdzislaw Galicki, Special Rapporteur for the topic "the obligation to extradite or prosecute (aut dedere aut judicare)".

5. Honoraria

501. The Commission reiterated once more the views it had expressed in paragraphs 525 to 531 of its Report on the work of its fifty-fourth session (A/57/10), in paragraph 447 of its Report on the work of its fifty-fifth session (A/58/10) and in paragraph 369 of its Report on the work of its fifty-sixth session (A/59/10). The Commission reiterates that General Assembly resolution 56/272 of 27 March 2002 concerning the question of honoraria especially affects Special Rapporteurs, in particular those from developing countries, as it comprises the support for their necessary research work.

B. Date and place of the fifty-eighth session of the Commission

502. The Commission decided that the fifty-eighth session of the Commission be held at Geneva from 1 May to 9 June and from 3 July to 11 August 2006.

C. Cooperation with other bodies

503. The Inter-American Juridical Committee was represented at the present session of the Commission by Ms. Ana Elizabeth Villalta Vizcarra, member of the Committee who addressed the Commission at its 2847th meeting on 1 June 2005.[403] An exchange of views followed.

504. At its 2851st meeting on 14 July 2005, Judge Jiuyong Shi, President of the International Court of Justice, addressed the Commission and informed it of the Court's recent activities and of the cases currently before it.[404] An exchange of views followed.

505. The Asian-African Legal Consultative Organization was represented at the present session of the Commission by its Secretary-General, Mr. Wafik Z. Kamil, who addressed the Commission at its 2853rd meeting on 19 July 2005.[405] An exchange of views followed.

506. The European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law were represented at the present session of the Commission by Mr. Guy de Vel, Director-General for Legal Affairs of the Council of Europe, who addressed the Commission at its 2860th meeting on 29 July 2005.[406] An exchange of views followed.

507. On 27 May 2005, an informal exchange of views was held between members of the Commission and members of the European Society of International Law on the topic of Responsibility of international organizations.

508. On 13 July 2005, an informal exchange of views was held between members of the Commission and members of the legal services of the International Committee of the Red Cross on topics of mutual interest.

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[403] This statement is recorded in the summary record of that meeting.

[404] Idem.

[405] Idem.

[406] Idem.

509. On 4 August 2005, an informal exchange of views was held between members of the Commission and members of the Sub-Commission on the Promotion and Protection of Human Rights on issues of mutual interest, and in particular on the topic "Reservations to Treaties".

D. Representation at the sixtieth session of the General Assembly

510. The Commission decided that it should be represented at the sixtieth session of the General Assembly by its Chairman, Mr. Djamchid Momtaz.

511. Moreover, at its 2865th meeting, on 4 August 2005, the Commission requested Mr. Ian Brownlie, Special Rapporteur on the topic "Effects of armed conflicts on treaties", to attend the sixtieth session of the General Assembly under the terms of paragraph 5 of General Assembly resolution 44/35.

E. International Law Seminar

512. Pursuant to General Assembly resolution 59/41, the forty-first session of the International Law Seminar was held at the Palais des Nations from 11 July to 29 July 2005, during the present session of the Commission. The Seminar is intended for advanced students specializing in international law and for young professors or government officials pursuing an academic or diplomatic career or posts in the civil service in their country.

513. Twenty-four participants of different nationalities, mostly from developing countries, were able to take part in the session.[407] The participants in the Seminar observed

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[407] The following persons participated in the forty-first session of the International Law Seminar: Ms. Paula Cristina Aponte-Urdaneta (Colombia); Ms. Nicola Brown (Jamaica); Mr. Daniel Costa (USA); Mr. Eric De Brabandère (Belgium); Mr. Diallo Madou (Mali); Mr. Ekouevi Eucher Eklu-Koevanu (Togo); Ms. Amelia Emran (Malaysia); Ms. Ginette Goabin Y.A. (Benin); Mr. Øyvind Hernes (Norway); Mr. Kumar Karki Krishna (Nepal); Mr. Lazarus Kpasaba Istifanus (Nigeria); Ms. Magdalena Lickova (Czech Republic); Ms. Norma Irina Mendoza Sandoval (Mexico); Ms. Loretta Mensa-Nyarko (Ghana); Mr. Makenga Mpasi (Congo); Ms. Maryam Norouzi (Iran); Mr. Eric Rabkin (Canada); Ms. Aušra Raisyté-Daukantiene (Lithuania); Mr. Shikhar Ranjan (India); Ms. Neni Ruhaeni (Indonesia); Mr. Scott Sheeran (New Zealand); Ms. Annika Elisabeth Tahvanainen (Finland); Mr. Knut Traisbach (Germany); Mr. Lijiang Zhu (China). A Selection Committee, under the Chairmanship of Mr. Jean-Marie Dufour (President of the Geneva International Academic Network, GIAN), met on 20 April 2005 and selected 24 candidates out of 110 applications for participation in the Seminar.

plenary meetings of the Commission, attended specially arranged lectures, and participated in working groups on specific topics.

514. The Seminar was opened by the Chairman of the Commission, Mr. Djamchid Momtaz. Mr. Ulrich von Blumenthal, Senior Legal Adviser of the United Nations Office at Geneva, was responsible for the administration, organization and conduct of the Seminar.

515. The following lectures were given by members of the Commission: Mr. Victor Rodriguez-Cedeño: "*Unilateral Acts*", in cooperation with Ms. Maria Isabel Torres Cazorla; Mr. John Dugard: "*Diplomatic Protection*"; Mr. Djamchid Momtaz: "*Advisory opinion of ICJ of 9 July 2004*"; Mr. P.S. Rao: "*International Liability of acts not prohibited by International law*"; Mr. Chusei Yamada: "*Shared Natural Resources*"; Mr. M. Koskenniemi: "*Fragmentation of International Law*"; Mr. Giorgio Gaja: "*Responsibility of international organizations*".

516. Lectures were also given by Mr. Arnold Pronto, United Nations Office of Legal Affairs: "*The Work of the ILC*"; Mr. Vincent Cochetel, UNHCR: "*International Refugee Law - Recent Developments*"; Mr. Yves Renouf, Legal Adviser WTO: "*The WTO Dispute Settlement System*"; Mr. Markus Schmidt, OHCHR: "*The Work of the Human Rights Committee*". Study visits were organized to CERN and to Palais Wilson.

517. Each Seminar participant was assigned to one of two working groups on "*Unilateral Acts*" and "*Diplomatic Protection*". The special rapporteurs of the Commission for these subjects, Mr. Victor Rodriguez Cedeño and Mr. John Dugard, provided guidance for the working groups. The groups presented their findings to the Seminar. Each participant was also assigned to submit a written summary report on one of the lectures. A collection of the reports was compiled and distributed to all participants.

518. Participants were also given the opportunity to make use of the facilities of the United Nations Library, which extended its opening hours during the event.

519. The Republic and Canton of Geneva offered its traditional hospitality to the participants with a guided visit of the Alabama and Grand Council Rooms followed by a reception.

520. Mr. Djamchid Momtaz, Chairman of the Commission, Mr. Sergei Ordzhonikidze, Director-General of the United Nations Office at Geneva, Mr. Ulrich von Blumenthal, Director of the Seminar, and Mr. Scott Sheeran, on behalf of the participants, addressed the Commission and the participants at the close of the Seminar. Each participant was presented with a certificate attesting to his or her participation in the forty-first session of the Seminar.

521. The Commission noted with particular appreciation that the Governments of the Czech Republic, Finland, Germany, Mexico, New Zealand, Sweden and Switzerland had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The financial situation of the Fund allowed to award a sufficient number of fellowships to deserving candidates from developing countries in order to achieve adequate geographical distribution of participants. This year, full fellowships (travel and subsistence allowance) were awarded to 10 candidates and partial fellowship (subsistence only) to 6 candidates.

522. Of the 927 participants, representing 157 nationalities, who have taken part in the Seminar since 1965, the year of its inception, 557 have received a fellowship.

523. The Commission stresses the importance it attaches to the sessions of the Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations, which have their headquarters in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 2006 with as broad participation as possible.

524. The Commission noted with satisfaction that in 2005 comprehensive interpretation services were made available to the Seminar. It expresses the hope that the same services will be provided for the Seminar at the next session, within existing resources.